TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 517.

JOHN H. LEYSON, AS ADMINISTRATOR, WITH THE WILL ANNEXED, OF ANDREW J. DAVIS, DECEASED, PLAINTIFF IN ERROR,

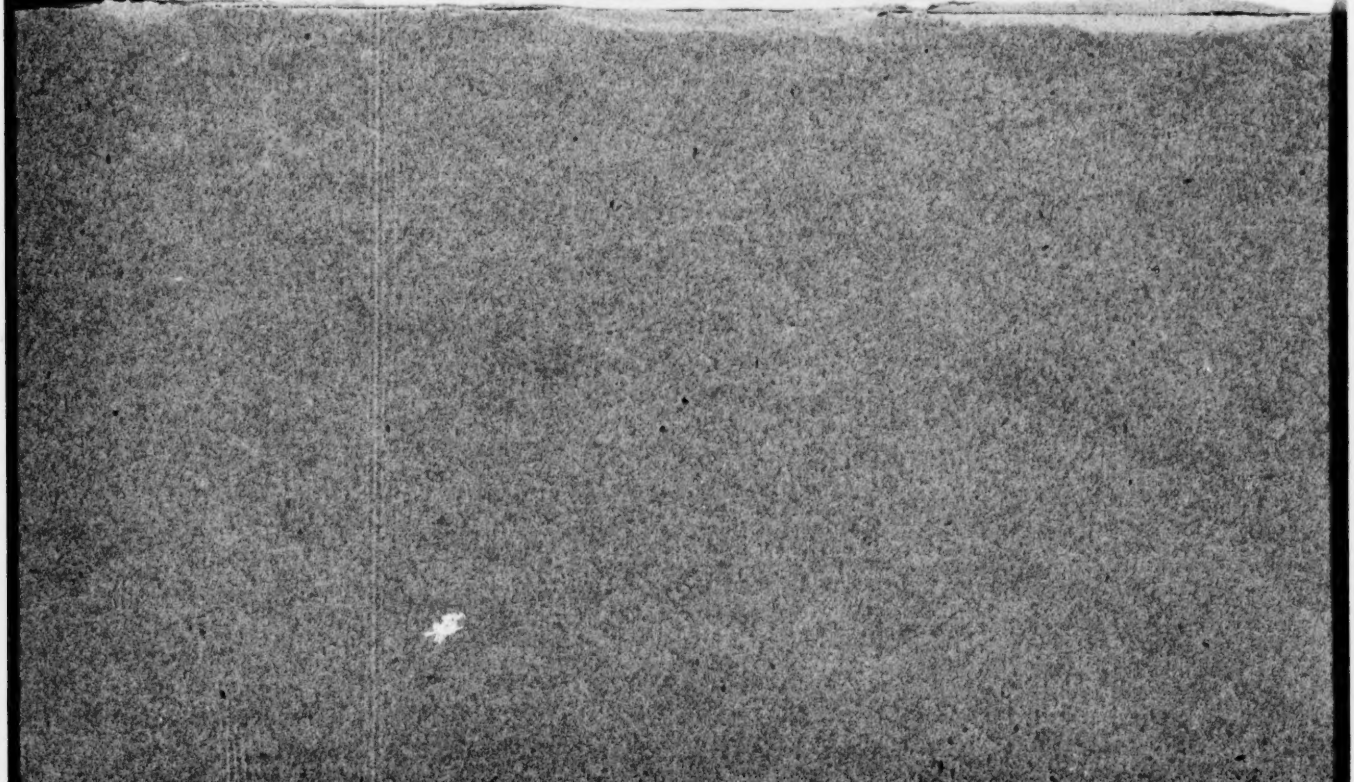
vs.

ANDREW J. DAVIS, Jr., AND THE FIRST NATIONAL BANK OF BUTTE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED NOVEMBER 26, 1897.

(16,730.)



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UNITED STATES OF AMERICA, *ss:*

he President of the United States of America to the honorable the judges of the supreme court of the State of Montana, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of e judgment of a plea which is in the said supreme court, before ou or some of you, being the highest court of law or equity of the id State in which a decision could be had in the said suit, between ohn H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff and appellant, and Andrew J. avis, Jr., and The First National Bank of Butte, defendants and spondents, wherein was drawn in question the validity of a treaty statute of or an authority exercised under the United States and e decision was against their validity, or wherein was drawn in uestion the validity of a statute of or an authority exercised under id State, on the ground of their being repugnant to the Constitun, treaties, or laws of the United States, and the decision was in vor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath appened, to the great damage of the said plaintiff and appellant, by the complaint of Henry A. Root, Sarah Maria Cummings, llen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and lvin P. Davis, heirs, next of kin, and persons interested in the tate of Andrew J. Davis, deceased, appears, we, being willing that ror, if any hath been, should be duly corrected and full and speedy stice done to the parties aforesaid in this behalf, do command you, judgment be therein given, that then, under your seal, distinctly d openly, you send the record and proceedings aforesaid, with l things concerning the same, to the Supreme Court of the United ates, together with this writ, so that you have the same in the id Supreme Court, at Washington, within 60 days from the date reof, that, the record and proceedings aforesaid being inspected, e said Supreme Court may cause further to be done therein to rrect that error what of right and according to the laws and stoms of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the nited States, the 29th day of October, in the year of our Lord one ousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

c [Endorsed:] Original. Supreme Court of the United States. John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff in error, against Andrew J. Davis, Jr., and The First National Bank of Butte, defendants in error. Writ of error. Robert G. Ingersoll, Walter S. Logan, Charles M. Demond, Henry A. Root, of counsel for plaintiff in error. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court, State of Montana.

d STATE OF MONTANA, } ss:
County of Lewis and Clarke, District of Montana, }

I, Benjamin Webster, clerk of the supreme court of the State of Montana, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 328, inclusive, contain a true and complete transcript of the record and proceedings had in the said supreme court of Montana in the case of John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff and appellant and plaintiff in error in said writ, *vs.* Andrew J. Davis, Jr., and The First National Bank of Butte, defendants and respondents and defendants in error in said writ, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Helena, State of Montana, in the district of Montana, in the ninth circuit, this 15th day of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk Supreme Court of the State of Montana.

e In the Supreme Court of the State of Montana.

JAMES A. TALBOTT, as Special Administrator of the Estate of Andrew J. Davis, Deceased, Plaintiff and Appellant,
vs.
ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, MONTANA, Defendants and Respondents.

Transcript on Appeal.

Appearances:
For appellant: McConnell, Clayberg & Gunn; Toole & Wallace, and W. F. Sanders.
For respondents: Forbis & Forbis, M. Kirkpatrick, W. W. Dixon.

Filed this 25th day of January, A. D. 1895.
BENJ. WEBSTER,
Clerk Supreme Court.

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1 In the Supreme Court of the State of Montana.

JAMES A. TALBOTT, as Special Administrator of the Estate of Andrew J. Davis, Deceased, Plaintiff and Appellant,

vs.

ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, MONTANA, Defendants and Respondents.

Be it remembered that on the 11th day of August, 1894, a statement on motion for new trial was duly settled and signed by the judge of the second judicial district of the State of Montana in and for the county of Silver Bow, that being the court in which said

action was pending; which said statement was thereupon duly filed with the clerk of said court. Said statement contains all the pleadings and other papers used on the trial, together with bills of exception duly settled and the judgment-roll. Wherefore they are not again inserted in this transcript, but may be found properly indexed in said statement. Said statement was and is in the following words and figures, to wit:

2 Be it remembered that on the 20th day of December, 1893, plaintiff filed his complaint herein, after which the following proceedings were had and done:

(Title of Court and Cause.)

(*Complaint.*)

Now comes the plaintiff in the above-entitled action, and for cause of action against said defendants alleges:

I. That plaintiff now is and at all times hereinafter stated was the duly appointed, qualified, and acting special administrator of the estate of Andrew J. Davis, deceased.

II. That the First National Bank of Butte, Montana, one of the defendants herein, is now and at all times hereinafter stated was a national bank duly organized and existing under and by virtue of the laws of the United States.

III. That Andrew J. Davis, plaintiff's decedent, died on the 11th day of March, 1890, leaving a large estate, among which

3 were and now are the following property, to wit, nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of the said defendants, consisting of and represented by certificate No. 10, for four hundred and eighty-one (481) shares; certificate No. 14, for three hundred and forty-three (343) shares; certificate No. 22, for one hundred and sixteen (116) shares, and certificate No. 25, for ten (10) shares; that all and singular the said stock stood upon the books of said defendant, The First National Bank of Butte, in the name of said decedent at the time of his death, and yet stand on said books in his name; that each of said certificates contains the following provision, to wit: "Transferrable only by him or his attorney on the books of this bank on the surrender of this certificate."

IV. That said decedent never endorsed, transferred, conveyed, or otherwise disposed of any of said stock to any person or persons, but that at the time of his death was the sole owner of the same and the whole thereof.

V. That prior to the commencement of this suit and on the — day of December, 1893, this plaintiff presented to the officers of said defendant bank a certified copy of his letters of administration and demanded that said stock be transferred on the books of said bank to this plaintiff as special administrator of said estate, but said defendant bank refused and still refuses to make such transfer.

4 VI. That said decedent was not at the time of his death in any way indebted to said bank, and said bank has and claims no lien upon said stock or any part thereof.

VII. That said stock is of the value of over nine hundred and fifty thousand dollars ($950,000).

VIII. That said defendant, Andrew J. Davis, now has the certificates representing said stock in his possession or under his control, claiming some right or title thereto or some interest therein; that this plaintiff on the — day of December, 1893, presented to said Andrew J. Davis a certified copy of plaintiff's letters of administration and demanded of said defendant the delivery and surrender to this plaintiff, as such administrator, of all of said certificates, but said defendant, Andrew J. Davis, then refused and still refuses to deliver or surrender said stock or any part thereof to this plaintiff, as such administrator or otherwise.

IX. That said defendant, Andrew J. Davis, is now and at all the times hereinafter stated was the cashier and one of the directors of the defendant bank and one of the officers who had charge of the transfers of stock on the books of said bank.

X. That said defendant, Andrew J. Davis, has not such
5 financial responsibility as equals the value of said stock.

—. That the claim of said defendant, Andrew J. Davis, to said certificates or of any interest therein is without merit or foundation in law or equity, but said claim and the possession thereof by said Andrew J. Davis casts a cloud upon the title of the plaintiff as such administrator, and prevents plaintiff from obtaining a transfer of said stock to himself as such administrator and holding the same subject to the operation of his trust.

XII. That plaintiff is informed and verily believes that it — his duty as such administrator to obtain possession of said stock in specie as an asset of said estate, and hold the same as administrator, subject to the further order of the court.

XIII. That the entire capital stock of said defendant bank consists of 1,000 shares; that said bank is an established institution with a large and increasing business, and that the dividends which will be earned on said stock and the increase in the value of said stock by the operation of said bank greatly exceed and will exceed the interest on the present value of said stock computed at the legal rate.

XIV. That plaintiff has no plain, speedy, or adequate
6 remedy at law.

XV. This action is brought pursuant to an order of this court made and entered on the — day of December, 1893, in the matter of the estate of Andrew J. Davis, deceased, herein pending, directing this plaintiff to institute this action.

Wherefore plaintiff prays:

1. That the claims of said Andrew J. Davis, defendant, be by this court declared unfounded, void, and of no avail.

2. That said defendant, Andrew J. Davis, be, by decree of this court, compelled to deliver and surrender to this plaintiff, as administrator, all of said certificates of stock.

3. That said defendant, The First National Bank of Butte, Montana, be, by decree of this court, commanded to transfer said stock to this plaintiff, as administrator, upon the books of said bank, and to issue

and deliver to said plaintiff as such administrator new certificates representing said stock.

4. For costs of suit.

TOOLE & WALLACE,
McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed Dec. 20, 1893.

7 (Title of Court and Cause.)

(*Summons.*)

The State of Montana sends greeting to Andrew J. Davis and The First National Bank of Butte, Montana, defendant-:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the second judicial district of the State of Montana in and for the county of Silver Bow, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought by the said plaintiff as special administrator of the estate of Andrew J. Davis, deceased, to recover judgment of the said Andrew J. Davis for the possession of nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of said defendants, consisting of and
8 represented by certificate No. ten (10) for four hundred and eighty-one (481) shares, certificate number fourteen (14) for three hundred and forty-three (343) shares of said stock, certificate numbered twenty-two (22) for one hundred and sixteen (116) shares of said stock, and certificate number twenty-five (25) for ten (10) shares of said stock, all of which stood upon the books of said bank in the name of said decedent at the time of his death, and which was the property of said decedent at the time of his death, and of which he was at that time the sole owner, and which said stock is of the value of nine hundred and fifty thousand ($950,000.00) dollars, certificates of which said stock *is* now in the possession or under the control of the said defendant, Andrew J. Davis, and which he refuses to deliver, although demanded so to do, and which *is* claimed by the said defendant, Andrew J. Davis, and which said claim is without any foundation in law or equity, and also for a judgment of the court decreeing and demanding the said defendant, The First National Bank of Butte, to transfer said stock to plaintiff as such special administrator upon the books of said bank, and to issue and deliver to said plaintiff as such special administrator new certificates representing said stock, and which it has heretofore been demanded to do, and for costs of suit.

9 And you are hereby notified that if you fail to appear and answer said complaint, as above required, the said plaintiff will apply to the court for the relief prayed for in the complaint.

Given under my hand and the seal of the district court of the second judicial district of the State of Montana this 20th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of Court.]

H. A. NEIDENHOFEN, *Clerk*,
By JAMES F. WILKINS,
Deputy Clerk.

OFFICE OF THE SHERIFF OF
SILVER BOW COUNTY, MONTANA.

I hereby certify that I received the within summons on the 20th day of December, A. D. 1893, and personally served the same on the 20th day of December, A. D. 1893, by exhibiting the original and delivering a true copy thereof to Andrew J. Davis personally and Andrew J. Davis, he being cashier of the First National Bank of Butte City, Montana, in the county of Silver Bow, Montana, they being the defendants named in said summons.

Dated this 22nd day of December, A. D. 1893.

Sheriff's Costs.

Service	1 00
Copies	1 60
Mileage	40
	3 00

Paid.

SAMUEL J. REYNOLDS, *Sheriff*,
By FRANK GEARY, *Deputy Sheriff.*

Filed December 22nd, 1893.

10 (Title of Court and Cause.)

(*Answer of Andrew J. Davis.*)

Now comes the defendant Andrew J. Davis and for his separate answer to the complaint of plaintiff herein—

Denies that the shares of the capital stock of the First National Bank of Butte, Montana, described in the complaint, or any of them, or represented by the certificates mentioned in the complaint or any other certificates, were or are the property or any portion of the estate of Andrew J. Davis, deceased, left by him at his death.

This defendant denies that said Andrew J. Davis, deceased, never transferred or conveyed or otherwise disposed of any of the said stock of the said First National Bank of Butte described in the complaint to any person or persons, and denies that at the time of his death he was the sole or any owner of said stock or the whole or any part thereof, but avers that at the time of the death of said

Andrew J. Davis this defendant was and ever since has been the owner of all of the stock and the shares thereof and the certificates representing the same described in the complaint and in pos-
11 session thereof, as hereinafter more particularly stated.

This defendant admits that he is now and for several years last past has been the cashier of the First National Bank of Butte, but denies that he is now or has been at any time since shortly after the death of said Andrew J. Davis a director of said bank.

This defendant denies that his claim to the shares and stock and the certificates thereof described in the complaint is without merit or foundation in law or equity, or that said claim or the possession of said stock or certificates by this defendant casts any cloud upon any title of plaintiff thereto, and avers that plaintiff has no title or right thereto, but that this defendant is in law and equity the owner thereof.

This defendant, further answering, avers that he was a nephew of the said Andrew J. Davis, deceased, and had been cashier of said First National bank for several years before the death of said Andrew J. Davis, and for some time before said death this defendant had managed and attended to all the business of said bank; that in the latter part of the month of December, 1889, the said Andrew J. Davis was and had been for some months seriously and dangerously ill and suffering from the disease and ailment
12 of which he afterwards died; that he was then about seventy years of age, and was preparing to travel to the Pacific coast for his health; that thereupon, on the twenty-seventy or twenty-eighth day of December, 1889, at Butte city, in the county of Silver Bow and State of Montana, the said Andrew J. Davis, being seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died, but being of sound and disposing mind and in view and in apprehension and expectation of his death from said disease or ailment or otherwise, gave to this defendant, as a gift, the shares and stocks and the certificates thereof of the said First National Bank of Butte, which are described in the complaint, and at the same time delivered said certificates of stock to this defendant as a gift, and this defendant then and there received and accepted the same; that thereafter, on the eleventh day of March, 1890, at Butte city, Montana, the said Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of said stock and certificates thereof to this defendant, as above stated, and that this defendant has ever since said gift and delivery retained and held in his possession and claimed as his own and does now so hold in his
13 possession and claim as his own all of the said shares of stock and the certificates thereof described in the complaint, and is now the owner thereof and entitled to have the same transferred to him upon the books of the said bank; but the said bank and the directors thereof have heretofore refused and now refuse to permit said stock and shares to be transferred on the books of said bank to this defendant or the plaintiff herein until the rights of the parties to said stock and shares are settled and determined by the court.

Defendant, having fully answered, asks that plaintiff take nothing by his complaint herein, and that by decree of this court this defendant be decreed and adjudged to be the owner of each and all of the shares of stock and the certificates thereof of the said First National Bank of Butte which are described in the complaint and entitled to have the same transferred to him on the books of said bank; that it be also adjudged that plaintiff, as special administrator of said estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim to said shares, stock, and certificates thereof or any part thereof; that the defendant bank herein be ordered to transfer said shares and stock to this defendant and issue to him new and proper certificates therefor, and that this defendant have any further and equitable relief in the
14 premises that may be necessary and proper, and that he recover of plaintiff or of the estate he represents his, defendant's, costs of this action.

M. KIRKPATRICK,
FORBIS & FORBIS, AND
W. W. DIXON,
Attorneys for Defendant Andrew J. Davis.

Duly verified.
Filed January 6th, 1894.

15 (Title of Court and Cause.)

(*Answer of First National Bank.*)

Now comes The First National Bank of Butte, Montana, one of the defendants in the above-entitled action, and for its separate answer to the complaint of plaintiff herein states that as to whether or not the shares of the capital stock of this defendant described in the complaint were or are the property or a portion of the estate of the said Andrew J. Davis, deceased, left by him at the time of his death, or as to whether or not said decedent never endorsed or transferred or conveyed or otherwise disposed of any of said stock to any person or persons, or as to whether or not he was the sole owner of the same and the whole thereof, or as to whether or not the claim of the defendant Andrew J. Davis herein to said certificates or of any interest therein is without merit or foundation in law or equity, or as to whether or not said claim and the possession thereof by said Andrew J. Davis casts a cloud upon any title of plaintiff, as administrator or otherwise, this defendant bank is not advised, but insists upon proof thereof, so far as may be necessary to protect the
16 rights of this defendant in this action.

This defendant, further answering, states that defendant Andrew J. Davis is now and has been for several years last pas tthe cashier of this defendant bank, but denies that he is now or has been at any time since shortly after the death of said Andrew J Davis, deceased, one of the directors of this defendant.

This defendant, further answering, avers that it has no interest in this controversy further than to protect itself; that it has heretofore

refused and now refuses to make any transfer on its books of the shares and certificates of stock described in the complaint, although requested by both plaintiff and defendant Andrew J. Davis so to do, but that this defendant is ready and willing to make such transfer whenever it can do so with safety to itself, to whoever the court may hold, upon final decision of this case, to be entitled to said stock and certificates, and to do whatever else shall be ordered by this court in the premises.

This defendant, having fully answered, asks judgment against plaintiff for its costs herein.

M. KIRKPATRICK,
FORBIS & FORBIS, AND
W. W. DIXON,
Att'ys for Defendant The First National Bank of Butte, Montana.

Duly verified.
Filed Jan. 6, 1894.

17 (Title of Court and Cause.)

(*Replication to Answer of Andrew J. Davis.*)

Now comes the plaintiff in the above-entitled action and for replication to the separate answer of Andrew J. Davis, one of the defendants therein, —:

1.

Denies that in the latter part of the month of December, 1889, or that at the time of the making of the alleged gift in said answer set forth, that the said Andrew J. Davis, deceased, was or has been for some months dangerously or seriously ill, or that he was at that time suffering from the disease or ailment from which he afterwards died, or that on account of such serious or dangerous illness the said deceased was preparing to travel to the Pacific coast for his health, and denies that on the 27th or 28th day of December, 1889, at Butte city, or at any other time or place, in the county of Silver Bow, State of Montana, or elsewhere, that the said Andrew J. Davis, deceased, in view or in apprehension or expectation of his death from said disease or ailment, or otherwise or at all, gave the said defendant, Andrew J. Davis, as a gift or otherwise, the shares of stock and the certificates thereof of the First
18 National Bank of Butte, or that at said time or at the time of the alleged gift the said Andrew J. Davis, deceased, was seriously or dangerously ill or suffering from the disease or ailment of which he afterwards died, or that at said time the said Andrew J. Davis, deceased, was of sound or disposing mind, and denies that at said time or at any other time the said Andrew J. Davis, deceased, delivered said certificates of stock to the said defendant, Andrew J. Davis, as a gift, or that the said defendant, Andrew J. Davis, then and there or at all received and accepted the same as a gift, or that the said Andrew J. Davis, deceased, on the 11th day of March, 1890, died from the same disease or ailment from which he

was suffering at the time of the alleged gift, and delivered said stock to the said defendant, Andrew J. Davis.

Denies that the said Andrew J. Davis, defendant, has ever since said pretended gift or delivery retained or held in his possession and claimed as his own said stock, or that he now so holds the same, or that he is now the owner thereof or entitled to have the same transferred to him upon the books of said bank.

This plaintiff for further replication avers that the facts
19 set forth in his said complaint are true, and asks judgment in accordance with the prayer thereof.

McCONNELL, CLAYBERG & GUNN AND
TOOLE & WALLACE,
Attorneys for Plaintiff.

Duly verified.
Filed February 3rd, 1894.

And the validity of the alleged gift, *causa mortis*, depending upon the testimony of James A. Talbott and the deductions to be drawn therefrom and involving a large amount, it is deemed proper to insert in this record the interrogatories and answers that the court may draw its own deductions therefrom, and the testimony of the said James A. Talbott and the interrogatories and answers *that the court may draw its own deductions therefrom, and the testimony of the said James A. Talbott and the interrogatories* so propounded to him were as follows:

20 J. A. TALBOTT, the plaintiff, called on behalf of the defendant, after being duly sworn, testified as follows:

Direct examination.

By Mr. DIXON:

Q. You are the plaintiff in this case?
A. Yes, sir.
Q. As special administrator of the estate of Andrew J. Davis, deceased?
A. Yes, sir.
Q. Where do you reside?
A. Butte city, Montana.
Q. How long have you lived in Butte?
A. Since '75.
Q. What business have you been engaged in during your residence in Butte?
A. Mining.
Q. Are you acquainted with the institution known as the First National Bank of Butte?
A. Yes, sir.
Q. How long have you been acquainted with that bank?
A. Since it was first opened.
Q. State about how long ago that was, if you know.
A. I think it must have been 12 or 15 years.

Q. What position, if any, have you occupied in that bank?

A. Director at one time, and since about three years, I guess, I have been vice-president.

Q. How long were you director?

A. Well, I must have been director about eight or nine years, I think. It must have been 12 or 15 years since that bank opened.

21 Q. Are you vice-president now?

A. Yes, sir.

Q. Did you know Andrew J. Davis, commonly called Judge Davis, and whom I will in my questions hereafter designate as Judge Davis, during his lifetime?

A. Yes, sir.

Q. State, if you know, when he died.

A. On the eleventh of March, 1890.

Q. Where did he die?

A. He died at his residence on East Broadway.

Q. In Butte?

A. Yes, sir.

Q. How long before his death had you been acquainted with Judge Davis?

A. I think I have been acquainted with him since '64.

Q. How well were you acquainted with him and was your acquaintance with him intimate or not?

A. Well, I was very intimately acquainted with him for the last eighteen or twenty years.

Q. Were you or not connected with Judge Davis in business at any time?

A. I was; yes, sir.

Q. If so, when and how long?

A. I was connected with him in mining and milling I think about seven or eight years before he died. Well, it was twelve years before he died, I guess; very near.

Q. What kind of business?

A. Mining.

Q. At the time of his death what position, if any, did
22 Judge Davis hold in the First National Bank of Butte?

A. President.

Q. Do you know Andrew J. Davis, one of the defendants in this action—frequently called Andy Davis, and whom in my questions to you hereafter I will designate as Andy Davis to distinguish him from Judge Davis?

A. Yes, sir; I know him.

Q. How long have you been acquainted with Andy Davis?

A. Well, I think I must have been acquainted with him about twelve years or it might be a little more.

Q. Did you or not know him before he came to Montana?

A. No; I didn't.

Q. How well and how intimately have you known him?

A. Well, I have known him very intimately for, say, eight or nine years.

Q. What is his business?

A. He is cashier now of the First National Bank of Butte.

Q. How long has he been cashier?

A. I guess he has been cashier about three years, probably, or a little over—three or four years.

Q. Before he was cashier how long had he been employed in the bank, if you know?

A. Well, I think ever since he came to the State, and that
23 would be about twelve years, probably, I should think; I couldn't say positively about that.

Q. You are not exact about these matters?

A. No; I am not exact about these matters. I never paid any attention to it.

Q. State, if you know, who managed the business or affairs of that bank for the last two years or thereabouts before Judge Davis' death?

A. Andy Davis.

Q. What relation, if any, was Andy Davis to Judge Davis?

A. Nephew, as I understood.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him; if so, when and what did Judge Davis say?

Mr. TOOLE: Objected to as incompetent and immaterial.

Mr. KIRKPATRICK: We might as well settle that question now, as we propose to introduce evidence as to the relations existing between the parties, the donor and donee, the feelings of affection and confidence, and the whole relation that existed between them; also to show by prior declarations of the donor, Judge Davis, that he intended to make a gift of this stock to the defendant, the
24 donee. We think that the law is clear upon this proposition.

Mr. TOOLE: We object to the question more particularly because it is as to his business capacity, which, we think, has no bearing upon the matter of the gift at all.

Objection overruled. Plaintiff excepts.

A. As to his business qualifications, the Judge thought there was nobody like him. Pertaining to the bank and so on he always thought he couldn't place anybody like him.

Q. Go on and answer the question in your own way. Of course, it is part of the question when and where you heard Judge Davis say anything with reference to Andy Davis' business capacity and character or as to his affection or liking for him.

A. Well, he always spoke of him as a good business man and just the man he wanted there and had to have, and that he was lucky to have him there. As to the time, I couldn't give any time, because he spoke that to me many a different time.

Q. During what years, can you say?

A. Well, I can say the last year of his life. I know he talked to me in 1889.

Q. More than once?

A. Yes; I think a great many different times.

Q. When and what, if anything, did he say in reference to
25 his affection or liking for Andy?

A. Well, he always spoke to me of him as a father would of his son. He felt that way, apparently, from his talk to me; he felt proud of him.

Q. Was that only on one occasion or frequently?

A. Frequently, sir: frequently.

Q. Did you at any time before the 27th or 28th of December, 1889, hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte, or his stock in it, in case of his death? If so, when, and what did he say?

Mr. TOOLE: We object to that upon the same ground as heretofore—that it is incompetent and inadmissible for the reason that the validity of this gift depends exclusively upon what transpired and was said at the time it was made.

Objection overruled. Plaintiff excepts.

Q. State if you ever heard him say anything about it, and, as near as you can, when it was and what he said.

A. Well, it was about that time—the 27th or 28th—that he gave that stock to Andy.

Q. Well, this question relates to before that time.

A. Well, I heard him say that he never intended the bank
26 to go in his estate; that he had always intended that for Andy, and that was what he expected to do with it.

Q. Can you say when that was?

A. Well, that was, I think, after the fire at the bank, as near as I can recollect, and that was in September, 1889. When he talked to me about that I think it was across the street, when he moved across after the fire.

Q. Did you hear him say that on more than one occasion?

A. Yes, sir; I heard him say it more than once; different times.

Q. Did you see Judge Davis about the 27th or 28th of December, '89?

A. Yes, sir.

Q. Where did you see him?

A. I saw him at his residence in Butte, East Broadway; that was about the 27th of December, '89.

Q. Were you present at that time at any conversation that occurred between Judge Davis and Andy Davis relating to certain stocks or shares in the First National Bank of Butte, owned by Judge Davis?

A. Yes, sir; I was.

Q. Give, as nearly as you can, the day of the month and the year when this conversation took place.

A. Well, it must have been between the 27th and 29th of the month that that thing transpired.

Q. What year?

A. 1889—December, 1889.

27 Q. You can't give the date any more definitely?

A. No; I can't make it any closer than that because I had some papers signed on the 27th of the month, I had some deeds, and that is the only way I can get back to that time, but when this thing came up I didn't know just when it was.

Q. You don't know just how long it was before he went away?

A. It was not more than a few days. He went away before New Year's.

Q. But you can't say the exact date?

A. I can't say the exact date; no, sir.

Q. It was between the 27th and the 29th?

A. Yes, sir.

Q. What time of day was it when this occurred?

A. It was in the evening.

Q. After dark?

A. Yes, sir.

Q. Who was present at that conversation?

A. Andy Davis and Judge Davis and myself.

Q. Any one else that you remember of?

A. They couldn't have been any one else that I know of that came from the outside. There might have been somebody in the house that lived there with him, Mr. Wehrspaun's family, but I couldn't say that anybody was in there.

Q. You don't remember?

A. I don't remember anybody else.

28 Q. How did you come to go to Judge Davis' house on that occasion?

A. Well, he had been for seven or eight days there settling, he and I, and Andy was with us all the time, and whether we wound up everything on the 27th or not, as to our business, I don't recollect positive on that, but that was the night that he signed this deed.

Q. What deed?

A. A deed to some property that he deeded to me.

Q. When you went to Judge Davis' house that evening, who was there besides him?

A. There was not anybody.

Q. Who came there afterwards, if anybody?

A. Andy came in.

Q. When Andy came, did he bring anything with him that you remember of?

A. Yes, sir; he fetched a box there with him, an iron or tin box, as it might be called.

Q. What kind of a box?

A. Iron or tin; I don't know what you might call it; it was painted.

Q. Do you know whose box that was?

A. It belonged to the Judge.

Q. Had you seen it before that time?

A. Yes, sir.

Q. Do you know where it was generally kept?

A. It was kept in the vault at the bank.

Q. Do you know what it contained, in a general way?

A. Well, I didn't know particularly what it contained
29 until that night.

Q. Do you know who kept the key of that box?

A. Well, he had it—Judge Davis had it himself.

Q. At the time of thois conversation, what was the condition of Judge Davis' health?

A. His health was poor.

Q. How long, if you know, had he been sick or in poor health?

A. Well, I think he had not been in good health—well, he had been four or five or six months in very bad health.

Q. Four or five or six months before this?

A. Before this; yes, sir. Worse than common, you know. He had not been well for a year or more.

Q. State what, if anything, you ever heard Judge Davis say prior to the time of this conversation as to his expectation of recovering his health.

Mr. TOOLE: We object, as it is a declaration prior to the time of the gift that is called for touching his health at that time.

Mr. DIXON: We expect to follow that up by showing what his expectation as to recovering or not was at the very time of this gift.

Objection overruled. Plaintiff excepts.

30 A. Well, he often said to me that he didn't never expect to recover from it; that he was too old to get over it; couldn't overcome the disease.

Q. Did he say that to you on more than one occasion?

A. Oh, yes; he spoke to me about that many a time. I would take him sometimes in the buggy and ride him up on the hill, and he would say that he was too old to handle this disease that he had, you know.

Q. How old was he at that time; do you know?

A. Well, he was about seventy when he died, and that was a year before. I think he was right close to seventy, if I recollect right. I recollect seeing the date of his age at that time, and I think it was close to seventy; maybe a month or two over or under. I have forgotten exactly about that.

Q. At the time of this conversation what was the condition of Judge Davis as to his soundness of mind and capacity to transact business?

A. Well, I think he could transact business as good as he ever could in his life, as far as I know, indeed, or ever seen him. I had quite a settlement with him, and I don't think that he overlooked anything.

Q. Did he transact on that day or the day before any other
31 business outside of that relating to the bank, that you know of?

A. Well, I had business with him right up to this time. You say the day before?

Q. Yes.

A. Well, he did transact business with me, but I don't know of anybody else.

Q. What did this business relate to?

A. Well, it was a settlement of money that I owed him on the sale of the mines.

Q. A settlement of accounts between you and him?

A. Yes, sir; between me and him.

Q. Did that extend over a considerable period of time?

A. Well, I think it was about seven years and seven or eight months that this account had been running.

Q. It included many different matters?

A. Yes, sir; many different matters, and it covered considerable money.

Q. That was all settled up between you and him, was it?

A. Yes, sir; all settled up.

Q. Did you say that was the same day or the day before?

A. Well, it might have been the day before that we settled everything up. When the deed was signed it might have been on the 27th, which would make it on the 27th to the 29th or some time.

Q. Was the deed signed on the same day of the conversa-
32 tion?

A. Well, I couldn't say positive whether it was the same day the deed was signed or not.

Q. I am not sure that you answered the question I asked you with reference to the condition of Judge Davis as to his soundness of mind. At the time of this conversation how did he appear and act?

A. Why, his mind was all right as far as I could see. I couldn't think anything else but that his mind was perfectly sound. From the business that I transacted with him I couldn't think anything else. He might be a little tired; it had taken a little long, and he might be a little tired, and that was the reason it took so long. We wouldn't be there more than three or four hours in the evening, and then we would let him have a rest, and he would get tired and we said we would let it go till next day. He would get a little tired, but he was all right.

Q. How long had that been going on?

A. Seven or eight days.

Q. And during that time he would talk about your business affairs every day?

A. Yes, sir.

Q. And matters were finally concluded between you there the day before or the same day that this conversation took place?

A. Yes, sir; the 27th, I believe, is the day that we wound
33 up our business, and this other thing might have come the next day, for all I know; I don't know about that.

Q. It was that day or the next?

A. Yes, sir.

Q. Now, Mr. Talbott, I want you to state as fully and as precisely as you can all that was said and done and that occurred at this conversation between Judge Davis, Andy Davis, and yourself be-

tween the 27th and 29th days of December, 1889, and which you have referred to. I would like you to go on and state everything that was said and done by everybody there as nearly as you can.

A. Well, he ordered the box fetched down the day before. Now, that might have been the 27th that he ordered the box. He said, "When you come down tomorrow fetch my box down," and he told me to come down, too. I came down ahead of Andy and was there in the room and Andy came down later on, and the Judge was down below in the kitchen or down in the dining-room below, and he came up after Andy came. I am not sure whether Andy went down after him or not, but anyway he came up, and then he wanted to look at these papers in the box, and he unlocked the box and pulled the papers out on the table.

Q. That is, the Judge did?

A. Yes, sir, and looked around them awhile and finally said, "Where is all of this? this isn't all; there is something that
34 is not here," he says, and it appeared that he got them all pulled out together and did not get them all. Andy told him he guessed they were all there, and he pulled the papers over and looked at them and found the missing papers and figured up and said they were all there.

Q. Who did that?

A. Andy did.

Q. What stock was this?

A. It was the stock of the First National Bank of Butte. Andy figured it up and told him, "That is all; it is all here." "Well, now," he says, "there is fifty shares in the directors' hands." Then he commenced going over the directors, and he came down to Hauser, and it appeared as if Hauser had nothing there; he had nothing there to represent from Hauser.

Q. What do you mean?

A. Nothing to show how Hauser held that stock. So he said to Andy, "You write to Hauser and see that he signs a contract, and do it right away," he says. Then the stock was all right; they understood then that there was nine hundred and fifty shares. Andy counted it up. There were 950 outside of what the directors had. Andy passed them over to the Judge after he figured up and showed him what there was of it, and he passed it back again, and he said, "I have always intended that for you; you take that."

Q. The Judge passed it back to Andy?

35 A. Passed it back to Andy; yes, sir.

Q. After Andy had figured it up and handed it to the Judge?

A. Yes, sir.

Q. And said what?

A. He said, "I have always intended that for you," he says, "and I want you to take it."

Q. Well, what did Andy do?

A. Well, Andy took it, and I sat there, and it was a kind of a surprise to me. I didn't expect anything of that kind. I didn't know what he did. I supposed he had his business or maybe would fix

his business in a different way, but he did that and he said, "I always intended to do that, and now I will do it." Andy picked up the stock and we commenced talking to him and telling him that we didn't think that he was so ill.

Q. What did Andy do with this stock?

A. He put it in his pocket. We told him we didn't think he was so seriously ill as he might think. "Well," he says, "I am an old man," he says, "and there is no telling. I can't stand what I used to. I don't think I can ever get over this disease," he says; "I can't stand it; I am too old; I can't expect it."

Q. State, as near as you can, just what he did say in reference to his expectation of recovering or not.

A. Well, he just said that he didn't expect he could.

36 He said we might think it, but, he says, "I don't. I only hope it will be so, but I don't think it."

Q. What did you or Andy say to him?

A. Well, we told him that we thought he would if he would go down there and give his business up and not be bothering about it; we thought he might improve.

Q. What do you say that he thought about it?

A. Well, he said he didn't think it. He said he was going to try it, anyway. He said, "I will get ready and go in the morning," and I think he went the next day after that.

Q. I believe you stated after Judge Davis gave Andy this stock what Andy did with it.

A. Yes, sir; he put it in his pocket.

Q. After the stock was given to Andy what was done with the box?

A. Andy fetched the box back to the bank.

Q. What was done with the key, do you remember?

A. I couldn't say.

Q. You don't remember who kept the key?

A. No; I couldn't say.

Q. How many certificates of stock were there—that is, how many pieces of paper?

A. Four pieces.

Q. If I understood you correctly, you said that Andy figured up this stock?

A. Yes, sir.

Q. There were four certificates, you said?

A. Yes, sir.

37 Q. When Andy figured up the certificates of stock did he or not have them in his hand?

A. Andy had them in his hand; yes, sir; at that time when he figured them up.

Q. When he figured them up what did he do with them?

A. He handed them back to the Judge.

Q. What did the Judge do with them?

A. He handed them over to Andy.

Q. Were they the same certificates?

A. Yes, sir.

Q. State whether or not you ever saw those certificates of stock afterwards.

A. No, sir; I never have.

Q. After that conversation, you mean?

A. Yes, sir.

Q. Did you or not ever have those certificates in your possession as special administrator?

A. No, sir.

Q. Or otherwise?

A. No, sir.

Q. State, if you know, how soon, if at all, after Judge Davis gave Andy these certificates of stock, as you have testified, Judge Davis left Butte.

A. Well, I think he left the next morning; that is my opinion.

Q. Where did he go?

A. Well, he started to go to the sound and stopped at Tacoma. I believe that is where he stopped at.

Q. State, if you know, from Judge Davis' declarations or otherwise, why he left Butte after that conversation.

38 Mr. SANDERS: Objected to; incompetent and hearsay testimony; not touching any proposition upon which hearsay testimony is admissible; not a part of the *res gestæ*.

Objection overruled. Plaintiff excepts.

A. He went, so he said, to see if he could not improve his health.

Q. Who went with him, if you know?

A. John A. Davis, his brother.

Q. State, if you know, when he returned to Butte.

A. Well, that I couldn't say—the time he returned, how long he was gone, or anything of that kind.

Q. State, if you know, who came back with him.

A. Andy came back with him.

Q. What has become of John A. Davis, if you know?

A. He is dead.

Q. After Judge Davis returned to Butte, where did he remain until his death?

A. At his residence, in Butte.

Q. State whether or not you saw him soon after his return to Butte?

A. I saw him the morning that he came back, the same morning.

Q. When he returned to Butte, what was the condition of his health and strength as compared with what it was when he left Butte?

39 A. It was worse. He was worse off when he came back than he was when he went away.

Q. A little worse or a good deal worse?

A. Oh, considerably worse.

Q. From the time of his return to Butte, how frequently did you see him up to the time of his death?

A. I think every day.

Q. After his return to Butte and up to the time of his death, what was his condition as to health or improvement in health?

A. He went down all the time from the time he came back.

Q. Do you know how long it was after he came back before he died?

A. No; I don't, because I can't place the time that he was gone down there.

Q. Can't place how long it was?

A. No; I couldn't place it.

Q. Well, you have some idea about it, haven't you?

A. Well, I should think that it was probably three weeks or may be four before he died after he came back.

Cross-examination.

By Mr. TOOLE:

Q. How long did you say you had known Judge Davis before his death?

A. I think I knew him since '64.

Q. What were your personal relations with him?

40 A. Back in early times?

Q. Yes, sir; that is what I mean.

A. Well, I had at one time—about the only business I ever had with him was I bought some liquor from him.

Q. Well, personally, friendly or otherwise?

A. Oh, friendly, certainly. I thought you meant in a business way.

Q. What were your business relations with him prior to his death?

A. Well, I never had anything, as I told you, outside of buying that liquor from him, and then afterwards we were in partnership here in mining ventures.

Q. How long have you known Andrew J. Davis, Junior, the defendant here?

A. I have known him ever since he came here, and I think it must be ten or twelve years.

Q. What official position does he hold in the First National bank, if any?

A. He is there now as cashier.

Q. What official position, if any, do you hold in the bank?

A. Vice-president.

Q. How long have you held that official position?

A. I think it is about three years.

Q. It has been since the Judge's death?

A. Yes, sir. I was a director before.

Q. How long has Andy held the position of casher of the

41 bank?

A. He held it before the Judge died. I don't know whether he was cashier or assistant cashier at that time; it was one or the other.

Q. You spoke of Judge Davis being president of the bank.
A. Yes, sir.
Q. How long was he president of the bank?
A. From its organization.
Q. Up till what time?
A. Till his death.
Q. Did he not hold also the office of director of the bank in connection with that of president?
A. I don't think that he did hold office as director; I am not sure. I don't know exactly, but the books will show that.
Q. What have been your personal relations with Andy since you have known him?
A. They have been good all the time.
Q. Friendly?
A. Yes, sir.
Q. What have been your business relations with him since you have known him?
A. I have had no business personal relations with him in any way.
Q. Have you been interested with him in any investments or anything of that sort lately?
A. Well, we have been interested in some little purchases, like the purchase of a mine, or locating it, or patenting it, or something like that.
42 Q. Well, you are partners in some mines in operation, aren't you?
A. No, sir.
Q. You mean that you are not operating the mine?
A. No, we are not operating it; but we own some like that together, jointly.
Q. How long have you been partners or joint owners in these mining properties?
A. I don't think it is over four years, probably. The records will show that, where we are interested together. I should say something like that *that*, though.
Q. Who has had charge and control of the business of the bank since the death of Judge Davis?
A. Well, I suppose he has had charge of it as cashier, and the directors have acted with him, like what we should do and what should be done, and so on, and advised with him in regard to such things as that.
Q. Who has?
A. The directors of the bank.
Q. Have you not what is known as an examining committee or anything of that sort—a discount committee?
A. No, I don't think we have anything of that kind. It is not headed in that way exactly.
Q. Who attends to that branch of the business?
A. The directors, I think, attend to all of that.
43 Q. Is there any other matters in which you and Andy are partners or interested together—any other corporations or anything of that kind?

A. Yes, sir; there is a corporation down in the Flathead country that he is interested in some, and I am interested in the same corporation.

Q. Do you hold your stock jointly?

A. No, sir.

Q. You say that Judge Davis acted as president of the bank up to the time of his death, did he?

A. Yes, sir.

Q. Who signed the drafts that were issued by the bank?

A. When he was alive?

Q. Yes, sir; when he was alive.

A. Well, at the time Mr. Hyde was there he was cashier and he used to sign the drafts. Afterwards, when Mr. Davis was cashier, I suppose he signed them.

Q. Were they signed by the president—any of them?

A. No, the president didn't sign, not unless there was no cashier there. He might do it then, just as I do now—if Andy should be out, I sign drafts as vice-president.

Q. You say that the Judge acted in the capacity of president all the time he was there?

A. Yes, sir.

Q. Were there any stockholders' meetings held after the 27th of December, 1889?

A. Yes, sir; there have been stockholders' meetings held.

Q. Do you remember about when the first stockholders'
44 meeting was held?

A. The first one after the 27th?

Q. After the 27th; yes, sir.

A. Well, I can't tell the date, but is was held at the regular time.

Q. Was it the fourteenth of January?

A. I couldn't say. Whatever time it was I suppose it was held at that time.

Q. Was the Judge present at that meeting?

A. We are speaking of after his death. No, sir; he was not.

Q. I speak of after the 27th of January, 1889.

A. Well, no, he was not at any meetings after that.

Q. Do you know whether any one actively and actually represented him in that meeting?

Mr. DIXON: We object, first, that this is not cross-examination, and, second, that the best evidence of that is the minutes of the meeting, the records of the bank. It is calling for something the best evidence of which is the minutes of the meeting.

Objection overruled. Defendant excepts.

A. Well, to the best of my recollection, he was represented by a proxy from him.

Q. By whom?

A. By John E. Davis.

Q. You speak, Mr. Talbott, of a tin box having been brought to the Judge's residence the day before, do you?

45 A. No, sir.

Q. The day before the gift that you refer to?

A. No, sir.

Q. When was that brought down to his residence?

A. It was brought down the same day that the gift was made.

Q. Did you not say something about his having directed it to be brought down the day before?

A. The day before he ordered it. He said, "When you come down you fetch that box of mine down."

Q. And this is the box, you take it, he referred to at that time?

A. Yes, sir.

Q. And who do I understand he said this to—to bring the box down?

A. To Andy. He said, "When you come down tomorrow evening, you fetch that box down."

Q. In endeavoring to fix the date at which this gift was made, Mr. Talbott, you do it by reference to the execution of a deed by the Judge to yourself, do you?

A. Yes, sir.

Q. Where was this deed executed?

A. Down in his house—right in his house there.

Q. He had a little front-room office with a writing stand or table in the center, did he not?

A. Yes, sir.

Q. Was this deed executed at this little stand or table?

A. Yes, sir.

46 Q. He signed it there?

A. He signed it there.

Q. Where was Judge Davis sitting at the time that he gave this stock to Andy?

A. Well, he was sitting like if Mr. Dixon was sitting at the corner of the stenographer's table; I was sitting about this way and Andy was sitting about where the stenographer is; that was about the position.

Q. All around this little writing desk there together?

A. Yes, sir; a small little table. It is not as large as the stenographer's desk.

Q. How was the Judge's health during this time that you were having these business settlements with him?

A. It was poor; very poor, I think.

Q. You couldn't see any perceptible change in him from the time you commenced settling the business until he left, could you, or observe any?

A. Well, I couldn't say that he got any particularly worse or failed from day to day or anything. He went along about the same.

Q. Apparently about the same that he was in the beginning?

A. Yes, sir.

Q. Who did the figuring during the time that you were having this settlement with the Judge?

A. Andy done it.

Q. Did he assist any in doing it?

A. No; he didn't assist any.

47 Q. He was present and participated in it?

A. Yes, sir.

Q. When he called for this box was it placed on this little writing stand or table?

A. Yes, sir.

Q. The same one upon which this deed was signed?

A. Yes, sir; the same table.

Q. Was this stock unfolded—those certificates of stock, were they unfolded and opened up?

A. Well, he pulled them out of the box and they were all together. There were other papers in the box besides the stock, you know.

Q. Were they unfolded and examined?

A. Yes, sir.

Q. Are you familiar with the stock of the bank?

A. Yes, sir.

Q. Has this stock blank assignments on the back of it for signature?

A. Yes, sir.

Q. How long was it, if you can fix it, from the date that Judge Davis made this gift until he left here for Tacoma?

A. Well, my impression is that he left the next day after that gift; that is my impression, but I am not certain.

Q. Now, can you get at about what day in December it was that he made this gift? What day would you say it was, the 27th or the 28th?

A. Well, if I was going to say, I think it was the 27th, be-

48 cause, I think, he signed the deed the same night that the stock was given, on the table.

Q. Which did he do first, did he sign the deed before he gave the stock or afterwards?

A. He signed the deed before.

Q. You think it was signed the day before?

A. No; I don't know whether it was signed the day before or the same night; I couldn't say.

Q. You can't say really whether or not, then, this deed that was executed to you was signed at the same time or not that he gave this stock?

A. No; I couldn't say positively as to that; I couldn't say.

Q. It may have been signed at the time you had this conversation, may it not?

A. Yes, sir.

Q. You think it is more probable that he left the next day?

A. After he made the gift I am satisfied he went the next day.

Q. You fix the date of that by the signature and date of the deed?

A. Yes, sir.

Q. At the time that you say Judge Davis gave Andy this stock did he make any written assignment of it or sign this blank assignment of it on the back of the stock?

A. No, sir; he did not.

Q. This room and writing desk that you refer to was in
49 the front end of the building, wasn't it?

A. No, sir; it was in the back end.

Q. In the back end of his residence?

A. Yes, sir; the back end of the building, where his bed and all was in the same room. It was the last room that he ever used in the house.

Q. Were you acquainted with the business habits of Judge Davis, Mr. Talbott?

A. I think I was; yes, sir.

Q. You have had a great deal of business with him, one way and another, in the last eight or ten years before his death, haven't you?

A. Yes, sir.

Q. What were his habits with respect to fixing up business in a business-like way and consum-ated things in a business manner?

A. Well, I used to think that he was pretty apt to do a thing up right.

Q. Generally left nothing undone when he undertook to finish up his business, did he, about business matters?

A. Well, I didn't think he would. I always thought he was a man that——

Q. He was apt to consummate things in pretty good shape?

A. Yes, sir.

Q. So as to leave no questions about it?

A. No.

Q. Wasn't he a very parlicular man to see that things were
50 done up in such shape that there could be no contention about it?

A. That was what he always aimed to do, sir.

Q. Wasn't he especially that way in making things certain and absolute?

A. Well, a man would think it if he went to get anything from him. When he got done he would think he wanted to have it fixed just right.

Q. So there would be no question about it afterwards?

A. Yes, sir; that would be his idea.

Q. You say, I believe, that Judge Davis stated that he was going to the sound for the benefit of his health?

A. Yes, sir.

Q. Did he say anything about whether he thought it would improve it or not; that was his purpose in going?

A. That was his purpose in going, to see if it wouldn't.

Q. Was Judge Davis familiar with the by-laws and regulations of the bank there?

A. Well, I should think he was; I don't know. That is something I couldn't say, whether he was or not.

Q. He acted as president in the meeting of the directors and stockholders?

A. Yes, sir.

Q. He seemed conversant with its by-laws, did he not?
A. I should think so.
Q. Wasn't he a man that would, from his characteristics,
51 naturally investigate such matters and post himself thoroughly upon it?
A. I think so; yes, sir.
Q. That would be his inclination?
A. Yes, sir.
Q. A man of clear mind, wasn't he; pretty clear?
A. Yes, sir.
Q. And good business qualifications?
A. Yes, sir.
Q. Frequently called the attention of the directors to the by-laws and their application to matters that came up, did he not?
A. Yes, sir; I think I heard him do so.
Q. What kind of ink and pen did you have on that table at that time when the deed was signed and the conversation took place?
A. I couldn't say what kind it was.
Q. Black or blue or what?
A. Well, I can't say that. The document can tell whether it was black or blue, but I haven't got it with me.
Q. It was probably an ordinary inkstand and a steel pen?
A. That is what I think it was. I don't think it was anything else.
Q. What time of day was this when this transaction occurred?
A. It was in the night, sir.
Q. You think it was in the night also when he signed the deed?
A. Yes, sir; I am satisfied it was in the night when he signed it. We used to go down there and stay there till ten or eleven o'clock,
and sometimes we would go away before that. If we thought
52 he was getting tired and wanted to go to sleep and wanted to rest himself, we would slip out earlier. It was all night-work that we did over that.
Q. Do you recollect how long before this it was that Judge Davis had been down to the bank?
A. Do I remember how long before this?
Q. Yes.
A. Oh, it must have been quite a while since he had been at the bank; I couldn't say now as to the length of time, but he had not been in the bank for quite a long time.
Q. Some time before?
A. Some time before.
Q. Can you fix it anywhere near any particular date?
A. I don't think he had been in the bank for two or three weeks.
Q. Two or three weeks before this occurrence?
A. Yes, sir.
Q. You stated, I believe, that you can't remember the exact date when he returned?
A. No; I couldn't do that.
Q. Have you anything that you can refresh your memory from as to that date?

A. I don't know that I have or any way that I can refresh my memory.

Q. What was his condition within a day or two after his arrival or return from his trip to Tacoma?

A. It was very bad.

53 Q. What was his condition, mental and physical, say the next day or the day after that?

A. After he came back?

Q. Yes.

A. Well, he was in a condition that he was not fit to walk across the floor without help. I was almost afraid to see him undertake it for the first day or two after he came back.

Q. What his mental condition at that time?

A. He appeared to be clear the first day or two.

Q. But after that?

A. After that it was not; no.

Q. He would not be competent to know anything?

A. No; he would probably talk for a minute or two all right and ask me about the mines and how they looked and so on, and in a minute from that he would be all shook up again.

Q. You spoke about the keys of this little tin box which enclosed the bank stock there. Do you know who had possession of those keys prior to this time?

A. I think Judge Davis always had it.

Q. Did you ever see anybody else have them?

A. No.

Q. Did you ever see him have them prior to that day?

A. Yes, sir; I have seen him open that box before.

Q. Do you remember about how often?

A. I think I saw him open it two or three times to my knowledge.

Q. Can you say whether you know if he left those keys with Andy frequently?

54 A. I don't. I think he always kept them with himself. I don't think that he ever left them.

Q. Do you know whether he did frequently leave them with Andy?

A. That I can't say.

Q. You don't know?

A. No.

Q. After his return from the coast did you see those keys at any time?

A. No; I never saw them.

Q. Never saw them after that?

A. No.

Q. This box was then, as I understand you, returned to the vaults of the bank?

A. Yes, sir.

Q. By whom was that returned to the vaults of the bank?

A. Well, I didn't go right to the bank with Andy that night, but he had it and went to the bank and I suppose he put it in.

Q. He went there for that purpose?
A. Yes, sir.
Q. Have you seen that box frequently since?
A. Yes, sir; I have the box in my possession now.
Q. You say that you have not had possession of that stock, either as executor or otherwise, since that time?
A. No, sir; I haven't.
Q. You never had possession of it in any way prior that time, did you?
A. No, sir.
Q. In other words, you mean to say that Andy took possession of it and kept it?
A. Yes, sir.

55 Q. And this suit is simply to try who is entitled to the possession of it?
A. Yes, sir.
Q. I will get you to state whether you were a witness here on a former occasion, on a trial where the question of the ownership of this stock came up, for the purpose of ascertaining whether or not it should be credited as assets of the estate of Andrew J. Davis.
A. I was; yes, sir.
Q. You were sworn as a witness there, Mr. Talbott, were you?
A. Yes, sir.
Q. And you gave in your evidence at that time?
A. Yes, sir.
Q. Can you remember about the date at which you gave in your testimony, Mr. Talbott?
A. The date that I gave it in then?
Q. Yes, sir; as near as you can get at it.
A. Well, it was the time that I gave it in—it was the time that the administrator question was up there.
Q. Can you recollect about what date it was?
A. I couldn't say now.

Mr. TOOLE: We will ask the clerk to give us that date.
The STENOGRAPHER: It was from April 19th to April 24th, 1890.

56 Q. Was it some time from the 19th to the 24th of April, 1890—about that time?
A. Yes, sir.
Q. Were you interrogated at that time by Mr. Forbis, attorney for John A. Davis, and by Mr. Myers, attorney for Mr. Root and others, in reference to this matter of the gift of the stock?
A. Yes, sir; I was.
Q. Were you asked this question, Mr. Talbott, "Where do you reside?" and di- you answer it, "At Butte city, Montana"?
A. Yes, sir.
Q. Were you asked the question, "How long have you resided here?" and did you answer it, "Since the winter of 1875, I think"?
A. Yes, sir; that is right.
Q. In answer to the question, "Did you know Andrew J. Davis, now deceased, in his lifetime?" did you answer that you did?

A. Yes, sir.

Q. In answer to the question, "How intimately?" did you answer in substance, "I have been doing business with him pretty near for ten years or nearly twelve"?

A. Yes, sir.

Q. When asked when you were in his employ, did you say, "Some of the time"?

A. Yes; I think I did.

Q. When asked what was the character of your employment under Andrew J. Davis, did you answer, "Managing agent of his mines"?

A. Yes, sir.

57 Q. When you were asked, Were you or were you not quite intimate with him? did you answer that you were?

A. Yes, sir.

Q. When inquired of as to whether you knew Andrew J. Davis, Junior, did you answer, Yes?

A. Yes, sir.

Q. Mr. Talbott, here is a question propounded to you. I will read it and your answer: "I would like to call your attention to an occurrence between Andy J. Davis, Junior, and Judge Davis, deceased," a question by Mr. Forbis, "with reference to a conversation in which Judge Davis made certain gifts to Andrew, and I will ask you to state if you remember that conversation;" to which you answered, "I think I do; yes, sir." Is that correct?

A. I think it is.

Q. You were asked the question, Where was it? and in answer you said, It was at his house where he lived—Judge Davis' residence?

A. Yes, sir.

Q. You were asked whether it was in this city and you answered, Yes, sir, did you?

A. Yes, sir.

Q. You were asked then, and I call your attention closely to this, "State what occurred," and you answered, "Just before he started for Tacoma, going down on the coast, I went there for seven or eight days. I had some business with him, and we were down

58 there, Andy and I, different times in that seven or eight days before he left. With regard to this gift that he gave Andy in regard to this stock of the First National bank, he had a box there, and he took the stock out and looked it over and gave it to Andy. He said he didn't know whether he would ever come back or not; there might be an accident on the railroad. We told him we thought that he would come back—that he would live ten or fifteen years." Is that your statement there?

A. That is right; yes, sir.

Q. You were asked then, "Andy told him that?" and you answered, "Yes, sir; and I did the same. He said the train might jump the track and might kill him, and he said, 'If I don't come back or anything happens I want you to have that.'" Is that your language?

A. Well, that is about the sum and substance of it—that he wanted him to have the stock.

Q. "At that time what was the condition of Andrew J. Davis, deceased?" and you answered, "I think it was poor. His physical condition was poor." Is that correct also?

A. Yes, sir.

Q. "Was he ill at that time?" and your answer was, "Yes, sir." That is correct, is it?

A. Yes, sir.

Q. You were asked, "What was he going to Tacoma for?"
59 and you said, "He thought it might improve him." Is that correct?

A. Yes, sir.

Q. You were asked, "What did he do towards delivering this stock to Andy?" and you answered, "He gave the stock to him; put it over to him across the little table." Is that correct?

A. Yes, sir.

Q. "What was Andy's condition at that time, mental and physical?" Your answer is, "He was sitting at the table in a chair and had this tin box there."

A. Yes, sir.

Q. "The young man?" "Yes, sir."

A. Yes, sir.

Q. You were asked, "Have you detailed pretty much the conversation?" You answered, "I think about what transpired."

A. Yes, sir.

Q. On your examination by Mr. Myers this question was asked you, was it: "Mr. Forbis asked you why the Judge was going to Tacoma, and you answered that he thought it would do him good. How do you know he thought so?" You answered, "I don't know that he thought so. We thought so, and he did, too." Is that correct?

A. Yes, sir.

Q. "Did he say so?" You answered, "Yes, sir; he did. He said when he was down there before with Judge Knowles and Dixon it did him good, and he was going down to see if it wouldn't do him good again." That is correct, is it?

A. Yes, sir.

60 Q. "What were his words, as near as you can recall them?" You answered, "He said he was going down the coast: that it did him good before and he was going down to see if it wouldn't do him good again. It was the best place that he had found in all of his travels." Is that correct?

A. Yes, sir.

Q. You were asked if he returned from there, and you said that he did?

A. Yes, sir.

Q. What you stated there is correct, is it, Mr. Talbott?

A. Yes, sir; that is about the substance of it.

Q. To the best of your knowledge?

A. To the best of my knowledge; yes, sir.

Q. And that is a correct statement of what transpired?
A. Yes, sir.
Q. It was given by you shortly after the gift, which was some four or five years ago. This testimony was given soon after the transaction occurred?
A. Yes, sir.
Q. And you would be more likely to remember then what transpired, would you not?
A. Well, if I say anything today any different it can't be much different, because it is all in the same meaning—the same idea. I can't see where it would make any difference particularly.
Q. Well, you were called to give his language as near as you could, and you did it, didn't you, to the best of your knowi-
61 edge and judgment?
A. Yes, sir.
Q. Mr. Talbott, there is one thing. You think that Judge Davis left for this trip on the 27th of December, '89?
A. No; I wouldn't say on the 27th. I think that would be the night before and he would leave the next day, and that would be the 28th.
Q. Well, I mean this gift was made on the 27th?
A. Yes, sir; that is what I think.
Q. Now, where was the Judge prior to that time, in this city?
A. Yes, sir; he was in the city. From the time he came back with Mr. Dixon and Knowles he was not away anywhere.
Q. Do you know how long he was in the city of Butte here before this gift was made, Mr. Talbott?
A. He must have been here—if I knew the time that he came back from below I could tell pretty close, but I don't know how long he was gone down there. It would be anyhow 30 or 40 days and maybe 50 days, but I couldn't say positive as to that.
Q. Do you know what time it was that he was down at Tacoma with Mr. Dixon and Judge Knowles?
A. I know he was down there before September.
Q. You know it was before September?
A. Yes, sir.
Q. He never made any trip down there between September
62 and December 27th?
A. No, sir; he was here. He didn't make any trip after that.
Q. You know he was here during all of October, do you?
A. I am satisfied he was; yes, sir.
Q. And all of November?
A. Yes, sir.

Redirect examination.

By Mr. Dixon:

Q. Who was John E. Davis, Mr. Talbott?
A. He was a son of John A. Davis.
Q. A brother of Andy?

A. A brother of Andy.

Q. You speak about this writing desk or table on which you say this deed was signed and at which the party was seated when this conversation took place. What room of the house do you say that room is in?

A. It is in the north end of the house.

Q. The back end of the house?

A. Yes, sir; the back end.

Q. Is it a writing desk or a table?

A. It is just a little table. I think it has got round corners, if I recollect properly. I know it is a very small table.

Q. In the testimony that has been read to you that you gave on the hearing with reference to the property of the estate,
63 do you consider that you gave any different account of this transaction from what you have given here today?

Mr. TOOLE: We object to that.

Objection sustained. Defendant excepts.

Q. Did you on that former examination state everything that occurred?

A. No, sir; I didn't state everything.

Q. Have you upon this examination stated everything that occurred, as well as you could remember?

A. I think so; everything that would be connected with the case. There were little things came up there talking about different things, but nothing about that gift or anything.

Q. You stated in your former examination, as read to you, that Judge Davis said that something might happen to him—the train might run off the track. How did he come to make that remark?

Mr. TOOLE: We object to that; incompetent.

Objection overruled. Plaintiff excepts.

A. The reason was that we told him, you know, that we didn't think—tried to brace him up and make him think that he was not so bad off, you know, and then it was that he said the train
64 might jump the track and he get killed that way. He said, "You are taking chances all the time when you are on a train," or something to that effect. That was how that came about.

Q. When you were called to testify upon this prior hearing, Mr. Talbott, did you know that you were going to be called before you went on the stand?

A. No, sir; I did not.

Mr. TOOLE: We object to that; immaterial, irrelevant, and incompetent.

Objection overruled. Plaintiff excepts.

Q. Had you on that occasion or prior to your being called on that occasion given any particular thought to that matter?

A. No; I hadn't; not a thing.

Q. If there is any difference in the statement that you gave on

your testimony before and that you have given now, which would you say was correct?

Mr. SANDERS: We object to that; incompetent and irrelevant. Objection overruled. Plaintiff excepts.

A. Well, I think that the statement I gave today is as near correct as I could give it, then or any other time. I don't see how I could better it any. There might be a word here and there
65 that would mean a little different, but at the same time it all means the same to me when I come to put it all together.

Recross-examination.

By Mr. TOOLE:

Q. There may, you say, have been some things transpire that you did not testify to on the former trial, but what facts you did testify to on this former trial are correct, are they not—the facts?

A. Well, I should say that they were; yes, sir.

Q. While you might not have remembered some things that you testify to now, what you did testify to then is correct?

A. Yes, sir.

66 And it being conceded on the trial of this cause that the said defendants had the affirmative, the following testimony was introduced to support the issues joined by the pleadings herein on their part:

JAMES A. TALBOTT, plaintiff in this action, being introduced as a witness on behalf of the defendants, testified as follows:

I am the plaintiff in this action and special administrator of the estate of Andrew J. Davis, deceased, and reside in Butte city, Montana, and have resided there since 1875, and am engaged in mining. I am acquainted with the institution known as the First National Bank of Butte and have been acquainted with it since it first opened, say 12 or 15 years. I have occupied the position of director and for the last three years have been president in that bank. I have been a director eight or nine years, possibly 12 or 13 years, since the bank opened. I am now vice-president. I know Andrew J. Davis, commonly called Judge Davis, and know when he died, which was on the 11th of March, 1890. He died at his residence on East Broadway, in Butte city, Montana. I had been acquainted with him since 1864, and was very intimately acquainted with him for the last 18 or 20 years; was connected with him
67 in business, in milling, I think, about seven or eight years before he died, probably 12 years or very near. Judge Davis was president of the First National Bank of Butte at the time of his death.

I am acquainted with Andrew J. Davis, one of the defendants in this action. I have been acquainted with him about 12 years; it might be a little more. I did not know him before he came to Montana. I have known him very intimately for the last eight or nine years. He is cashier, I would say about three years probably,

say three or four years. He had been employed in the bank before that; in fact, ever since he came to the State, probably for 12 years; for the last twelve years, I should think. Andy managed the business of the bank for the last two years or thereabouts before the Judge's death. Andrew was a nephew of the Judge.

Whereupon the following interrogatory was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis, or as to his (Judge Davis') affection or liking for him? If so, when and what did Judge Davis say?

Which said question was objected to by counsel for plaintiff as incompetent and immaterial, and which said objection was
68 overruled at the time and duly entered in accordance with the statute in such case made and provided.

And in the argument of the said question E. W. Toole, of counsel for plaintiff, limited his objection thereto, "more particularly in so far as it applied to the business capacity of the said Andrew Davis;" which objection was likewise overruled by the court, and to which ruling the said plaintiff, in due and proper form and in accordance with the statutes in such case made and provided, excepted.

A. The Judge thought there was nobody like him as to his business qualifications. Pertaining to the bank and so on, he always thought he could not place anybody like him. He always spoke of him as a good business man and just the man he wanted there and had to have, and that he was lucky to have him there. He spoke of this matter to me many different times. He spoke of it the last year of his life, and I know he talked of it in 1889 more than once—a great many different times. He always spoke to me of Andy as a father would of his son. He felt that way apparently from his talks with me. He felt proud of him. This occurred frequently.

69 And the said defendants propounded the following question to the said witness:

Q. Did you at any time before the 27th or 28th of December, 1889, hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte, or his stock in it, in case of his death? If so, when and what did he say?

To which interrogatory counsel for plaintiff objected for the reason heretofore stated and for that it is incompetent and inadmissible, as the validity of this gift depends exclusively upon what transpired and what was said at the time it was made.

Which objection was by the court overruled; and to which ruling of the court the plaintiff then and there duly excepted and had the same entered in accordance with the statute in such case made and provided.

A. I heard him say that he never intended the bank to go in his

estate; that he had always intended that for Andy, and that was what he expected to do with it.

This was after the fire at the bank, as near as I can recollect, and that was in September, 1889, when he talked to me about that. I think it was across the street—when he moved across after the fire. I heard him say that at different times. I saw Judge Davis about the 27th or 28th of December, 1889, and was present at that
70 time that the conversation had occurred between Judge Davis and Andy relating to the stock of shares in the First National Bank of Butte owned by Judge Davis. It was some time between the 27th and 29th of the month of December, 1889. I cannot give the date any more particularly. I had some papers signed on the 27th of the month. It was but a few days before he went away, and he left before New Year's. It is between the 27th and 29th and after dark. There was present at this conversation Andrew Davis, Judge Davis, and myself. There may have been others in the house, but cannot say others were in the room. I don't remember of any one else being there. The way I came to go up to Judge Davis' house was this: We had been for seven or eight days there settling, and Andy was with us all the time, and whether we wound up everything on the 27th or not as to our business I don't recollect positively, but it was the night he signed this deed; a deed, I mean, of some property that he deeded to me. When I reached the house that evening there was nobody there but Judge Davis. Andy came in afterwards. He brought with him a box; an iron or tin box it might be called. It was a painted box and a box that belonged to the Judge. I had seen it before that time. It was generally kept in a vault of the bank. I did not know particularly what it
71 contained until that night. Judge Davis kept the key to it. At the time of this conversation Judge Davis' health was poor. He had not been in good health for four or five or six months. He was in very bad health. He had not been well for a year or more and worse than commonly before this.

Here the witness was asked the following question:

Q. State what, if anything, you heard Judge Davis say prior to the time of this conversation as to his expectation of recovering his health.

To which interrogatory plaintiff objected for the reason that it called for a declaration prior to the time of the gift touching his health at that time; which objection was overruled and exception duly taken and entered in accordance with the statutes in such case made and provided.

A. Well, he even said to me that he did not never expect to recover from it; that he was too old to get over it; could not overcome the disease.

He spoke that way frequently. I took him buggy-riding frequently, and he would say to me that he was too old to handle this disease that he had. He was about 70 years old when he died, and this conversation was the year before. I think he was close to 70.

His mind was sound at the time of this conversation, and I
72 think he could transact business as good as he ever could in his life, as far as I know. I had had quite a settlement with him and do not think that he overlooked anything. I had business with him right up to this date. I don't know of him transacting business with anybody else. The business I had with him was with reference to money that I owed him on a sale of the mines, being a settlement of accounts between him and myself, which extended over about seven years and seven or eight months and included many different items and matters and covered considerable money. I cannot say positively whether the deed was signed on the same day of the settlement or not, nor whether it was signed on the same day of the conversation. His mind was all right so far as I could see. I think his mind was perfectly sound. From the business I transacted with him I should not think otherwise. He might become a little tired, and it took a little longer to make the settlements. We would not be there more than three or four hours in the evening, and then we would let him have a rest when he would get tired, and we would say to him that we would let it go to the next day. He would get a little tired, but was all right. This had been going on for seven or eight days, during all of which time we talked about our business affairs every day, and the matter was finally concluded between us on the day this conversation
73 occurred or the day before, I am not sure; think it was the 27th. The conversation to which I have referred between Andy Davis, Judge Davis, and myself was this: He ordered the box fetched down the day before. Now, that might have been the 27th when he ordered the box. He said, "When you come down tomorrow, fetch my box down," and he told me to come down too. I came down ahead of Andy and was there in the room before Andy came down, and Andy came down later on, and the Judge was down below in the kitchen or down in the dining-room below, and he came up after Andy came. I am not sure whether Andy went down after him or not, but anyway he came up, and then he went to look at these papers in the box and pulled the papers out on the table. I mean the Judge did this, and looked round them awhile and finally said, "Where is all of this? This is not all. There is something is not here." And it appeared he got them all pulled out together and did not get them all. I mean the shares of the bank stock. Andy told — he guessed they were all there, and he pulled the papers over and looked at them and found the missing papers, and figured it up and said they were all there. Andy is the one that did this. It was the stock of the First National Bank of Butte. Andy figured it up and told him, "That
74 is all: it is all here." "Well, now," he says, "there is fifty shares in the directors' hands." Then he commenced going over the directors and he came down to Hauser, and it appeared as if Hauser had nothing there. He had nothing there to represent from Hauser. I mean nothing to show how Hauser held the stock. So he said to Andy, "You write to Hauser and see that he signs a contract, and do it right away." Then the stock was all right, and

it was understood to be 950 shares. Andy counted it up, and there was 950 shares outside of what the directors had. Andy passed them over to the Judge after he figured up and showed him what there was of it, and he passed it back again, and he said, "I have always intended that for you, you take it." After the Judge had received it from Andy he passed it back over to Andy when he said this. He said, "I have always intended that for you, and I want you to take it" Andy took it, and I sat there and it was a kind of a surprise to me. I did not expect anything of the kind. I did not know what he did. I supposed he had his business or maybe would fix his business in a different way, but he did that, and he said, "I always intended to do that and now I will do it." Andy picked up the stock and we commenced talking to him and
75 telling him that we did not think that he was so ill. Andy put this stock in his pocket. We told him (the Judge) that we did not think he was seriously ill as he might think. "Well," he says, "I am an old man and there is no telling. I cannot stand what I used to. I do not think I can get over this disease." He says, "I cannot stand it. I am too old; I cannot expect it." As near as I can state just what he said with reference to his expectation to recovering was this. He just said that he did not expect he could. He said, "We might think it, but," he says, "don't. I only hope it will be so, but I don't think it." We told him that we thought he would if he would go down there and give his business up and not be bothering about it. We thought he might improve. He said that he did not think so, but that he was going to try it anyway, and he said, "I will get ready and go in the morning," and I think he went the next day after. When Judge Davis gave Andy this stock he put it in his pocket. I don't know what became of the key. I don't know and I cannot say who kept the key. There were four pieces of stock. Andy figured up this stock. There were four certificates, I mean, of the stock. Andy had the
76 stock in his hands when he figured up the stock. He handed them back to the Judge and the Judge handed them back to Andy. They were the same certificates. I never have seen them afterwards. I mean after this conversation. I never have had them in my possession as special administrator. I think Judge Davis left about the next morning after he gave Andy these certificates. He started to go to the sound and stopped at Tacoma. I believe that is where he stopped at.

And the said defendant- propounded to the said witness the following question:

Q. State, if you know, from Judge Davis' declarations or otherwise when he left Butte after that conversation.

Which question was objected to as incompetent and hearsay testimony and not touching any proposition upon which hearsay testimony is admissible nor a part of the *res gesta*.

Which objection was overruled, and to which ruling of the court the plaintiff then and there duly and properly excepted.

And in answer to the said question the said witness stated:

A. He said he went to see if he could not improve his health. John A. Davis, his brother, went with him. I don't remember the exact time when he returned. Andy came back with
77 him. John A. Davis is dead. After the Judge returned to Butte he stayed at his residence until his death. He saw me the morning that he came back. His health was worse. He was worse off when he came back than he was when he went away. He was considerably worse. I saw him every day after his return to Butte from that time on. He went down all the time from the time he came back. I don't remember how long it was after his return he died. It was probably three weeks, maybe four, but he died after he came back.

And the said witness, upon his cross-examination, stated substantially as follows:

I knew Judge Davis since 1864. My personal relations were friendly with him. I bought liquors from him and then afterwards we were partners in mining ventures. I have known Andrew since he came here—I think, about twelve years. He is cashier of the First National Bank of Butte and I am vice-president of it. I have held that position about three years. I have held it since the Judge's death, and was a director before Andrew held the position of cashier, before the Judge's death. I think either cashier or assistant cashier. Judge Davis up to the time of his death was president of
78 of the bank from its organization. I don't think he was a director; I am not sure, however. Andrew and myself have been on good personal relations ever since I have known him. We have been interested in some little purchases, like the purchase of mines, locating them or patenting them, or something like that; we are partners in mines, but are not operating them; we have been partners or joint owners in these mines I don't think over four years. I suppose Andrew has had charge of the bank as cashier, together with the directors, who have acted with him since the Judge's death in directing him what he should do and what should be done and so on, and advising with him in regard to such things as that. I don't think we have any examining or discount committee; the directors attend to that branch of the business, I think. We are also interested in a corporation down in the Flathead country—that is, he is interested in some of it and I am interested in the same corporation, but we don't hold our stock jointly. When Mr. Hyde was there and cashier of the bank he used to sign the drafts, and afterwards, when Mr. Davis became cashier, I suppose he signed them. The president did not sign them unless the cashier was not there; he might do it then, just as I do it now as vice-presi-
79 dent. All the time the Judge was there he acted in the capacity of president. There has been stockholders' meetings held since the 27th day of December, 1889. There was one held at the regular date after that time. I suppose it was held on the 14th of January. The Judge was not at any meeting after the 27th of

December, 1889; he was represented at that meeting by John E. Davis, his proxy. The day before the gift the Judge directed Andy to fetch down that box of his, and it was brought down the next day. I fix the date of the gift by reference to a deed executed by the Judge to myself; it was executed down in his house. He had a little room, front room, office, with a writing stand or table in the center, and this deed was executed at this little stand. He signed it there. At the time Judge Davis gave this stock he was sitting like Mr. Dixon was sitting at the corner of the stenographer's table, I was sitting about this way, and Andy was sitting about where the stenographer is; we were all around the small little table; it is not as large as the stenographer's desk. Andy figured up the stock, no one assisted him in doing it, and the box was placed on this little writing stand, the same upon which the deed was signed.

These certificates of stock were there unfolded and examined.

80 The stock has a blank assignment on the back of it for signatures. I think that this gift was made on the 27th, because he signed the deed on the same night the stock was given on the table. He signed the deed before he gave the stock. I don't know whether it was signed the day before or on the same night. This deed may have been signed at the time we had this conversation. At the time the Judge gave Andy this stock he did not make any written assignment or sign the blank assignment of it on the back of the stock. The room and writing desk I refer to at which we were sitting at the time this stock was given was in the back end and not the front end of the house. His bed and all were in the same room. It was the last room he ever used in the house. I was acquainted with the business habits of Judge Davis. I have had a great deal of business with him one way or another in the last eight or ten years before his death. His habits with respect to fixing up business in a businesslike way and consummating things in a business manner I used to think he was pretty apt to do. I don't think he would leave anything undone when he undertook to finish up his business about business matters. He was apt to consummate things in pretty good shape so as to leave no

81 question about it. He was a very particular man to see that things were done up in shape that there could be no contention about it; that is what he always aimed to do, sir. A man would think if he want to get anything done from him when he got done he would think he wanted to have it fixed up just right. A man would think that he was especially that way in making certain and absolute so there could be no question about it afterwards; that would be his idea. He stated that he was going to the sound for the benefit of his health. It was his purpose in going to see if it would not improve him. I should think Judge Davis was familiar with the by-laws and regulations of the bank. I don't know that he was, and it is something that I cannot say. He acted as president in the meetings of the directors and stockholders and seemed conversant with its by-laws, I think. He is a man who would naturally investigate such matters and post himself, I think; that would be his inclination. He was a man of clear mind and good

business qualifications; would frequently call the attention of the directors to the by-laws and their application to matters that came up. I think I have heard him do so. I cannot state what kind of pen and ink was on the table at the time the deed was signed and at the time the conversation took place. The document will tell whether
82 it was black or blue, but I haven't got it with me. It was an ordinary inkstand and steel pen. The transactions was at night. I think it was at night when he signed the deed; I am satisfied that it was at night when he signed it. It had been a long time before the Judge had been in the bank before this conversation or gift occurred. I cannot state how long; two or three weeks or more. A day or two after his return his condition was very poor; was not able to walk across the floor without help. I was afraid to see him undertake it for the first day or two after he came back. His mind was clear the first day or two after his return; after that it was not. He would not be confident to know anything. I think prior to the death of Judge Davis he had possession of the keys to this little tin box. I don't know that I ever seen anybody else have them. I had seen him have them before that day. This little tin box was after that returned to the vaults of the bank by Andy, I suppose; he went there for that purpose. I have seen the box frequently since and have it now in my possession. I mean to say that Andy took possession of the bank stock and kept it, and that I have not had possession of it, and that this suit is simply
83 to try who was in possession of it. I was a witness in the former trial, where the question of the ownership of this stock came up for the purpose of ascertaining whether or not it should be credited as assets of the estate of Andrew J. Davis. I was sworn there as a witness and gave in my evidence; it was from April 19th to April 24th, 1890, or about that time. I was interrogated by Mr. Forbis, attorney for Mr. John A. Davis, and by Mr. Myers, attorney for Mr. Root and others, in reference to this matter of the gift of the stock to Andy. I swore I resided in Butte city, Montana, and that I had resided there since the winter of 1875; that I knew the deceased in his lifetime; that I had been doing business with him for ten or 12 years, and stated that I was in his employ some of the time, and that I was managing agent of his mines; that I was quite intimate with him; that I knew Andrew J. Davis, Jr. I testified that I remembered the conversation in which Judge Davis gave to Andrew Davis the bank stock; that it occurred at the residence of Judge Davis, in this city. I testified that just before he started for Tacoma, going down on the coast, I went there for seven or eight days. I had some business with him, and that we were down there, Andy and I, different times in that seven or eight days before
84 he left. With regard to this gift that he gave Andy—in regard to this stock of the First National bank—he had a box there, and he took the stock out and looked it over and gave it to Andy. He said he did not know whether he ever would come back or not; there might be an accident on the railroad. We told him that he thought he would come back, and that he would live

ten or fifteen years. This is what I testified to then. It was Andy who told him that he thought he would come back and would live ten or fifteen years, and I did the same. He said "the train might jump the track and might kill him," and he said, "If I don't come back or anything happens I want you to have that." That is what I testified to; that is about the sum and substance of it—that he wanted him to have the stock. I also testified at that time that his physical condition, I thought, was poor. I also testified that he was going to Tacoma because he thought it would improve his health. I also testified that in so far as delivering the stock to Andy was concerned, he gave the stock to him; put it over to him across the little table. I also testified that I detailed pretty much the conversation, and that that was what transpired. Mr. Forbis
85 asked me whether the Judge was going to Tacoma, and I answered that "He thought that it would do him good;" that we thought so, and he did, too. He said, "When he was down there before with Judge Knowles and Dixon it did him good and he was going down to see if it would do him good again." He said, "It was the best place he ever found in all his travels." I also testified that Mr. Davis returned. What I testified to on that occasion is correct and is about the substance of it, to the best of my knowledge. It is a correct statement of what transpired. It was given by me shortly after the gift, which was four or five years ago. If I have said anything today any different it cannot be much different, because it is in the same meaning, the same idea. I cannot see where it would make any difference particularly. I was called on then to give the language as near as I could and did it to the best of my judgment.

On redirect examination the witness testified:

The little writing desk referred to is just a little table; I think with round corners. I mean the one where the deed was signed and is in the north end of the house. I did not state on the former testimony everything that occurred. I think I have done so this time—everything that would be connected with the case.
86 We had told that to Judge Davis, trying to brace him up and make him think he was not so bad off, and it was at that time that he said the train might jump off the track and he get killed that way. He said, "You are taking chances all the time when you are — the train," or something to that effect. That is how he come to say that the train might run off the track or something happen to him.

At the time I gave my former testimony I did not know what I was going to be called for; I had not given any particular thought to the matter.

And thereupon the witness was asked the following question:

Q. If there is any difference in the statement that you gave in your testimony before and that which you have given now, which would you say was correct?

Which question was objected to by plaintiff's counsel as irrelevant and incompetent, and which objection was overruled by the

court; to which ruling of the court plaintiff then and there duly excepted in accordance with the statute in such case made and provided.

To which question the witness answered:

87 —. Well, I think that the statement that I gave today is as near correct as I could get it then or any other time. I don't see how I could better it any. There might be a word here and there that might mean a little different, but at the same time it all means the same to me when I come to take it altogether.

On cross-examination the witness testified as follows: There may have been some things transpired that I did not testify to on the former trial, but what facts I did testify to on the former trial are correct. They were facts. Well, I might have remembered some things that I testified to now, but what I did testify to then is correct.

88 ANDREW J. DAVIS being called as a witness and being the defendant in this action and called for the purpose of testifying with reference to facts that occurred during the lifetime of the said deceased and with reference to conversations had with him, his competency as a witness was objected to by the plaintiff under section- 647 and 646 of the Compiled Statutes of the State; which objections was sustained.

89 CONRAD KOHRS, a witness on behalf of the defendants, testified as follows:

That he lived in Deer Lodge, and lived in Montana since 1862, and that he was intimately acquainted with Andrew J. Davis since 1894; that he met him often and was on very friendly terms with him, and knew him in Butte ever since he resided there and commenced his mining operations. His relations with him were intimate and pleasant. I had no business transactions with him until 1882, since which time he had frequent business transactions. I am acquainted with the association known as the First National Bank of Butte and have known it ever since its organization, and know the defendant, its cashier, Andrew J. Davis, and have known him about ten years. Here the following interrogatory was propounded to the witness:

Q. State, Mr. Kohrs, whether or not you ever heard Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him. If you did, when and what did Judge Davis say?

To which interrogatory, and especially the former portion thereof referring to the business capacity or character of the said
90 Andy Davis, and also the latter portion thereof referring to the affection or liking for him by the deceased, the same objection was interposed as had theretofore been interposed to a similar question propounded to James A. Talbott; which objection was overruled by the court, and to which ruling of the court the plaintiff then and there duly and properly excepted, and which ex-

ception was duly and properly entered in accordance with the statute in such case made and provided.

To which question the witness answered as follows:

A. Well, he always told me that he thought that Andy was a good boy, and that he had a good deal of confidence in him, and that he was a good business man and very capable in the position that he had at that time.

I have heard him say that several times before he dies. I used to go often to the Judge's rooms and spend the evening with him. The Judge had been to Europe and was telling me a good deal about his trip to Europe. He spoke of him (Andy) and said he filled the place better and was more of his own stripe. The old Judge was very close, you know, and I think that Andy is as close a business man, and for that reason he liked him and he
91 said often that he would do something for him at that time. I heard him make these remarks very frequently, and the Judge always regarded him as a close business man.

Whereupon the plaintiff called the attention of the court that it was the desire of plaintiff that it should appear that all of this testimony goes in under objections to the original question; to which Mr. Dixon, attorney for defendant-, consented, and which was so ordered by the court.

And thereupon the following question was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything about what disposition he intended to make of the First National Bank of Butte or his stock in the bank in case of his death?

To which question plaintiff objected for the reason that it is incompetent, immaterial, and irrelevant, and for the reason that the facts and statement at the time of the alleged gift must control it independent of such declarations and be sufficient within itself to constitute a gift *causa mortis*.

Which objection was by the court overruled, and to which ruling of the court plaintiff then and there and at the time duly excepted in the manner hereinbefore set forth; which said exception
92 was thereupon entered in accordance with the statutes in such case made and provided.

The witness further testified that the Judge had been to Europe, and some time in July, 1889, down at his house in Butte, his private residence, I spent an evening with him there. He spoke of going to Europe again, and desired me to accompany him on the trip and proposed to pay my expenses. He said, "I intend to make another trip to Europe, and before I go I am going to give the bank to Andy." That is what he stated and this is the way the conversation come about. Here plaintiff moved to strike out all of the witness'es statement with reference to what the deceased intended to do with the bank or bank stock, for the reason that it was based upon the condition that he got to Europe and for the reason that

he did not go; which motion was overruled and exception duly taken and entered in the manner and form aforesaid.

Continuing, the witness said: Shortly afterwards he again told me that he wanted to call in all of his outside business, and that he had intended to give the bank to Andy. He was anticipating at the time going to Europe that fall.

93 Here plaintiff moved to strike out said answer for the reason last stated herein; which motion was overruled by the court, and to which ruling of the court plaintiff then and there duly excepted and had the same entered in accordance with the statute in such case made and provided.

94 DANIEL W. DILLINGER, a witness on behalf of the defendants called, testified as follows:

That he was a resident of St. Paul, Minnesota, and that he resided in Butte city up to 1886, and that he had resided there since the spring or summer of 1876; that he knew A. J. Davis, commonly called Judge Davis, in his lifetime, and knew him since 1876 up to the time of his death. After leaving Butte city I visited that place about twice a year, and I was intimately acquainted and friendly with Judge Davis. I roomed at the bank and associated with him most every day when in town. I commenced rooming at the bank in 1883 and roomed there off and on up to 1886. I know the First National Bank of Butte and have known it since 1876. I know Andrew J. Davis, commonly called Andy Davis. He is defendant in this action. I have known him since 1880 or '81. I roomed with him from 1883 till 1886.

Here the following question was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him? If so, when and where
95 and what did Judge Davis say?

To which question the same objection as heretofore was interposed, and the same order of court overruling the same was made, and to which ruling due and proper exceptions were taken by the plaintiff.

To which question the witness answered:

A. I did. It had been mentioned quite often. He said that he was in *the* fact the only nephew that he had that amounted to a damn outside of John, and he said John had no force. He said he was going to try and make a banker out of him, and that it was his intention to give him the bank. He had a great liking for Andy. He used to want me to check up on Andy. If I had I might have been committing myself. I did not know what he meant by that. This occurred on a great many occasions from 1883 to 1886.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte or its stock in case of his death? If so, when and what did he say, and under what circumstances did any such conversation occur?

Which question was objected to by the plaintiff for the reason set forth in the objection to a similar question propounded to Conrad Kohrs in that the gift *causa mortis* could only be established by what transpired at the time the gift was made, and that whatever may have been the intention upon the part of the deceased to do at the time of his death is incompetent as tending to establish a gift *causa mortis*; which objection was overruled, and to which ruling of the court the plaintiff then and there in due form of law excepted.

A. In a month of December, '85, we were on our way to the city of Mexico by way of New York—that is, Judge Davis and myself—and he said that he thought that it was a great mistake that Mr. Hyde and myself had not purchased the bank which we had been talking about doing. He said as long as we had not it was his intention to give the bank to Andy in due course of time. He told me this in the strictest confidence at the time. In 1889, some time in the fall, I came to Butte to adjust a loss, having property in the same block as the bank, which had been burned. They were then doing business across the street from the present location, and I went in to interview the boys in the bank, and talked the kind of a building they were going to put up. I went to the Judge's office to talk with him, and suggested that if the bank was only one story Andrew would have no place to sleep.

The Judge had stated that he intended to put up only a one-story building, because he could make it strictly fireproof. After I had suggested that Andy would have no sleeping room he hesitated a moment and said he had not thought of that, and it was perfectly right that Andy should have sleeping-room, as the bank belonged to him. "If you have time we will go up and see John and see if it can be changed from one to two stories." We went up and asked John the question, and he said, "Yes; I can run it up six stories if you want, and he said, — while, "As the bank belongs to Andy, you will put him in a set of rooms, bath-room and everything complete." That was all the conversation, and it occurred in '89.

Whereupon the plaintiff moved to strike out all the testimony of said witness as incompetent and immaterial; which motion was overruled by the court and exceptions then and there properly taken in accordance with the statutes made and provided.

GEOFFREY LAVELLE, a witness on the part of the defendant, also testified:

I reside in Butte; have lived there since 1875; knew Andrew J. Davis, commonly called Judge Davis, since 1873 up to the time of his death. I was slightly acquainted with him up to the fall of 1875, in Butte. I had a good deal of business with him in a business way. I banked with his institution for a number of years from the time it started. I think one year after the S. T. Hauser & Co. bank started I have banked with that institution, and am ac-

quainted with the First National bank since its organization and have known Andrew J. Davis, commonly called Andy, since '72.

Here the following question was asked by defendants:

"Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy; and, if so, when and what did Judge Davis say? State the circumstances of the conversation."

To which question plaintiff then and there duly objected for the reason hereinbefore stated; which objection was overruled by
99 the court and exceptions then and there properly and duly taken; and the witness in response to the question said: I met Judge Davis in San Francisco in 1887, at the Palace hotel, and in conversation with him about young men generally who were doing business in Montana he referred to Andy as being a capable young man—the best in the Davis family—he and John, particularly Andy, as competent, and that he had a bright promise for the future. He said nothing about his affections for Andy, but seemed to think a good deal of him, so far as I could judge from his conversation.

The latter portion of which answer, respecting the witness's opinion, — moved to strike out; which motion was sustained by the court.

100 JOSEPH BROUGHTON, being a witness for the defendants, also testified:

I live at Walkerville, in Silver Bow county, and have lived there 13 or 14 years; was acquainted with Judge Davis during his lifetime; knew him 10 or 11 years; was rather intimately acquainted with him in a business way also, having done my banking business with him. We were quite familiar with one another. He would ask me down to his house once in awhile and we would have disputes and agreements, and so on. I am acquainted with the First National Bank of Butte, and know Andrew J. Davis, commonly called Andy, and have known him, I think, 9 or 10 years.

Q. Did you at any time hear Judge Davis say anythings as to the business capacity or character of Andy Davis or his, Judge Davis', affection or liking for Andy? If you did, state when and what you hear-; tell us the circumstances of the conversation.

To which question plaintiff interposed the objection as heretofore.

Which objection was overruled and exceptions in the manner heretofore stated duly and properly taken and entered.

101 A. "He always spoke very highly of Andy, and had great confidence in him, and felt quite safe in leaving business matters with him and in his hands, and so on." I think this occurred two or three times at his house. It must have been six or seven years ago. It must be somewhere in '88 or '7; I don't like to be sure, but from that time on we were quite intimate.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of

Butte or his stock in it in case of his death? If so, state the conversation, when and where it was, and what was said and all the circumstances.

To which question the plaintiff then and there objected for the reason that the alleged gift *causa mortis* could only be established by the facts and transactions that occurred at the time it was made, and that the independent fact as to the intention of the said donor to give it at the time of his death was incompetent to establish such a gift, and that it was immaterial to such intention.

Which objection was overruled by the court; to which ruling of the court the plaintiff then and there in due form of law excepted and which exception was duly entered accordingly.

102 To which question the witness answered:

A. I have had conversation with him on that subject. The last conversation we had I remember it because we were in the bank at the time it was being rebuilt. He told me that he was not interested himself very much in building the bank; that Andy's father was superintending it, and that when it was completed and all there was belonging to it——

Whereupon plaintiff moved that the answer be stricken out, as it had no reference to the question of the gift in controversy in this action, but referred to an intended gift at the time of the completion of the bank, which does not appear to have been executed.

Which motion was by the court overruled.

To which ruling of the court the said plaintiff then and there and in due form of law duly and properly excepted.

This conversation occurred, I think, in 1889. On another occasion I heard the Judge speak of this matter; it was prior to that, but I cannot give my date; I have nothing to go by, and I took no further notice of it then the conversation itself; but I remember well being in the basement of the bank; perhaps the year prior to the former conversation. I heard a conversation at his house,
103 in which he said the bank would be Andy's; that he intended to give the bank to Andy. I had been joking him at the time and telling him that he had not long to live; that he could not steady his hand, and that he would soon be dead, and that he ought to make a settlement of those things before that time came, and so on, and that is how it came about. This is the import of what he said. I could not, of course, go into the details.

104 W. W. McCracken, a witness on behalf of defendants, also testified—

That he lived in Butte and had lived there continuously since '86; was there prior to that time a few years and left again. I have been in the banking business ever since in Butte, and am in that business now in the Silver Bow National and am president of it. I knew Judge Davis during his lifetime; was personally acquainted with him since the fall of '80, probably, and knew him by reputation a great many years prior to that, and know the First

National Bank of Butte; was in its employ as book-keeper, I believe, in January, '83, and stayed with it up to September, '83. I think in the latter part of August, '86, I returned and was in the employ of the First National Bank of Butte continuously until, I think, in March, 1890, or perhaps February, 1890. I left — to the Judge's death, probably a few days before. I was very intimately acquainted with him and very well acquainted with young Andrew J. Davis, commonly called Andy, very intimately, and have known him since I returned to Butte in August, 1886. He was in the employ of the bank at the time I went back there.

105 Here the following question was propounded to the witness by the defendants:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? And if you did, state when and where and what you heard him say about the matter.

To which question the same objection and ruling of the court and exceptions to the ruling of the court were had as heretofore stated.

A. On enumerable occasions from the time I went there last in '86 until I left there I very often heard him say—indeed it was almost a daily conversation and subject of conversation. He would talk about the business in general and frequently, times without number, said in fact that the bank was Andy's and he considered it Andy's and wanted it so considered. On several occasions I remarked that *there* was giving the boy a good deal of money and the Judge would say that he was not giving him much—a hundred thousand dollars and what it earned. He did not look at it that he was giving him more than one hundred thousand dollars. I spoke to him several times about making the dividends and getting rid of the undivided profits, and he said, "No; I will never do that.

106 I will — take a cent out." He said *it* all this was bearing on matters having reference to Andy, in regard to the amount of what he proposed to give Andy.

By the COURT: Well, just take what he said with reference to Andy.

By the WITNESS: The Judge told me, in other words, that the bank was to be Andy's when he was gone—it was Andy's; the whole business—all of the capital stock of the First National bank.

By Mr. TOOLE, counsel for plaintiff:

Q. When he was going where?

By the WITNESS: Well, when he was dead. That was the idea—when he was gone. He wanted it understood by me that the entire business was to give everything. He did not specify that there were just so many shares or how many shares of stock was to go, but the entire bank was to be Andy's.

By Mr. DIXON: What did you ever hear Judge Davis say with reference to Andy's business capacity and character?

107 A. He had a very high opinion of him. He said he was a bright young man and was intellectual and honorable, honest and industrious.

108 CHARLES ELTINGE, a witness on behalf of defendants, testified:

I reside in Butte and have resided there since '81; am in the insurance business and have been engaged in the banking business here; was with Clark Brothers from '81 to '89, or Clark & Laribie most of the time. I know the institution called the First National Bank of Butte; been acquainted with it since I first came to Montana, in '81; knew Andrew J. Davis, commonly called Andy, and have known him since '81, and have known Judge Davis since I first came here. I met him almost every day. My duties called me to the First National bank every day, at least, and I met them in that way.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? If you did, state when and where it was and what the Judge said and the circumstances of the conversation.

To which question the attorneys for plaintiff interposed the same objection as heretofore, and the same ruling was made thereon by the court and the same objection duly taken.

109 A. In '88 I think it was. I remember one talk I had with him, though there were conversations besides that. I was called to the bank one afternoon after the doors had closed at three o'clock to make the exchanges, and it often happened that I was there a half an hour or so with nothing to do, waiting for the other clerks to get their business done, and would engage in conversation with the Judge. At the time I speak of Andy was sick and at the springs. The Judge said he had a very high opinion of Andy, and thought that he would make a good banker in time. This happened several times, but this particular time I remember because Andy was sick. In this conversation he remarked that he had a very high opinion of Andy and that he was progressing nicely.

Q. What did you hear Judge Davis say at any time as to what disposition he intended to make of the First National bank or his stock in it in the event of his death?

To which the same objection, the same ruling of the court, and the same exceptions to the ruling of the court were made.

A. This time he told me he intended to give Andy the bank and he hoped that his sickness would not amount to anything,
110 because he wanted him to be well before taking charge of it; because he wanted before he dies—he intended to give him the bank; he wanted him to be a healthy man; that was about his idea.

111 J. E. GAYLORD, a witness on behalf of the defendants, testified:

I have lived in Butte and have resided here since the fore part of '83, and am manager of the Parrot Silver & Copper Company. I know the First National Bank of Butte and have known it since '83, and knew Andrew J. Davis, commonly called Judge Davis, during his lifetime. I became acquainted with him in February, '83, and knew him up to the time of his death. I was quite well acquainted with him and had business transactions with him since that time during his life. I know Andrew J. Davis, commonly called Andy. He is my son-in-law. He has been my son-in-law since September or October, 1890.

Q. Did you at any time hear Judge Davis say anything as to the capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? If you did, state when and where and the circumstances of the conversation and what the Judge said in reference to it.

To which question the same objection was interposed and the same rulings of the court overruling the same and exceptions to the ruling of the court had and taken as heretofore.

112 A. I have heard him frequently express his confidence in Andy's application to business and business integrity and pleasure, with the manner in which he was taking hold of the business, on more than one occasion, once particularly before, I remember, in September, '87.

Q. Did you ever at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte or his stock in it in case of his death?

Same objection, ruling of the court, and exception as heretofore.

Q. (Continuing:) State when and where and what he said.

A. In September, '87, I had some business with the Judge, and he then stated that Andy would have the bank. There was some other conversation at the time and he expressed his satisfaction with the manner in which Andy had conducted matters in the bank. These statements were had on a number of times.

On cross-examination the witness stated the words he used were "That the bank would be Andy's." He did not state when it would be Andy's. His words were "That the bank would be Andy's."

113 He never said anything about when he intended to make the gift nor on what conditions he intended to make it. He just generally stated that it was his purpose to give it to him.

His words were "That the bank would be Andy's."

He did not say what disposition he would make of this bank on his death. I don't remember that he spoke of his death. The remark came about in this way: I had some business with him and he told me he wished Andy to fully understand all the business of the bank and the transactions, and he called Andy into the bank-room at that time and explained the business to him; the trans-

action I was having with the bank or was about to have. I went out and called him in myself at the request of the Judge.

114 GEORGE A. TONG, a witness on behalf of defendants, testified as follows:

I am now living on the Big Hole river; formerly lived in Butte city; came there in '75. I lived all the time up to the last summer and this winter in Butte; am engaged in mining. I know the institution called the First National Bank of Butte, and have known it ever*y* since it started; knew Andrew J. Davis, generally called Judge Davis, during his lifetime, and knew him for five or six years before he came over here, and knew him ever since he came here, up to the time of his death. I did all my banking business with him and was well acquainted with him. I lived right behind him in his office in Butte. I sold him the lot on which he lived. I used to go over there pretty near every evening. I know Andrew J. Davis, generally called Andy, and have known him since '86; before that, even. He was there a couple of years while Mr. Hyde was cashier.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection and liking for Andy? If you did, state when and where and what Judge Davis said about these matters.

115 To which *ruling* the same objections, ruling of the court, — exceptions were had and taken.

A. I used to go in there, of course, every morning, and where we were not talking about business the old Judge used to ask my opinion. He thought a good deal of Andy, and used to ask me if I did not think he was a very nice boy lots of times. I don't know what time this was. It was both before and while Mr. Hyde was cashier.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National bank or his stock in it; if so, where and what did he say?

To which the same objections, ruling of the court, and exceptions were had and taken.

A. He said that he was going to give it all to Andy. He told me that at least a dozen different times through Mr. Hyde's administration, and up to the last time I ever saw him; maybe not the last time, but along about there.

Here the deposition- of D. L. Balch, Charles F. Mussigbrod, and William H. Heald were offered in evidence.

To which the same objections to similar interrogatories as those heretofore, and the same rulings of the court were made, and the same exceptions to the rulings of the court aforesaid then and
116 there duly and properly taken and entered by the plaintiff.

117 A deposition of WILLIAM H. HEALD, so offered as aforesaid, is as follows:

My name is William H. Heald; I am 30 years old; reside at Wilmington, Delaware, and my occupation is national-bank examiner. I was a national-bank examiner during the year 1889; was acquainted with Andrew J. Davis, generally called Judge Davis, of Butte, Montana, and first knew him in August, 1889, and knew him from that time until his death. I first knew him as president of the First National Bank of Butte. Afterwards our acquaintance was somewhat of a personal nature, outside of his connection with the bank. I knew him as president of the First National Bank of Butte in 1889. I have been acquainted with Andrew J. Davis, generally called Andy, since August, 1889, and up to the fall of 1892. I met him several times a year and know him personally and socially outside of his connection with the bank. He was cashier of the First National Bank of Butte during the entire time of my acquaintance with him. He is known as the nephew of Judge Davis. I know the First National Bank of Butte and knew it during the years 1889 and 1890, 1891, and 1892, during which time I was examining national banks in Montana.

118 Q. State whether you ever heard Judge Andrew J. Davis say anything as to his intentions with regard to the said First National Bank of Butte and to the said Andrew J. Davis, the defendant, or as to what disposition the said Judge Davis intended to make of said bank or his interest therein. If you did hear him say anything about these matters or any of them, state as near as you can when and where it was and how he came to say anything about these matters and what he said and what was said by any one else. If you heard the said Judge Andrew J. Davis say anything in relation to these matters on one or more occasions, please state fully the occasion, circumstances, when and where you heard him say anything about these matters, what he said, and how the conversation between you and he occurred, if any such there were, and who was present at any such conversations.

To which question the plaintiff then and there objected; which objection was overruled by the court, and the same exception to the ruling of the court taken and entered as hereinbefore set forth.

119 A. On August 12th or 13th, 1889, I was sitting in the back room of the First National Bank building talking to Judge Davis, and, among other things, we were discussing Andy Davis, and I stated to the Judge that the — for Andy were great and for such responsibilities he was not getting much money. The Judge replied, "That will be all right, as Andy some day will get the bank, anyway." Afterwards, in October, 1889, I saw Judge Davis at his house in Butte city. His health at that time was failing, and in the course of general conversation he repeated the conversation of August previous, that Andy should have it all when he, Judge, was gone. At neither time was any one present but ourselves, although, in October, D. A. Flowerree was with him part of the time, but not when we were talking on that matter. I know nothing more.

120 E. E. BALCH, a witness on the part of defendants, testified as follows:

I am the assistant cashier of the Omaha National bank, and had a general supervision of the outside banks connected with the bank during the year, and travelled a good deal over the West, including Idaho, Washington, Oregon, and Montana. I knew the institution known as the First National Bank of Butte; knew Andrew J. Davis, commonly called Judge Davis; knew Andrew J. Davis, commonly called Andy Davis; knew them in Butte, Montana, during the year 1886; knew them by meeting them at the bank. I knew the Judge about three years before his death. I had no business relations with him except as business came up between the two banks—I mean the bank of which he was president—the First National Bank of Butte—and the bank I represented at Omaha. I was out several times between 1886 and 1889, and generally saw him while there; saw him sometimes on business matters and sometimes socially. I have known Andy ever since the bank commenced doing business. Judge Davis was president of the bank and Andy cashier.

Here the same objection, ruling of the court, and excep-
121 tions to the ruling of the court with reference to interrogatories pertaining to the same matters as hereinbefore had were had.

I met Andrew J. Davis some time during the month of November, 1889, on the same boat, going from Tacoma, Washington, to Victoria, at which time I talked with him relative to the stock of the First National Bank of Butte. We were together nearly all of one day on the boat referred to, and he told me during the conversation that his health was very poor, and that he had started to take a trip to Japan, hoping to improve by the sea voyage, but that he did not know whether he would be able to continue or not, as he was feeling very poorly. We talked over the business of his bank several times during the day, and during the conversation he stated that — had built that bank up by his own personal efforts, and had made it the best bank in Montana, and had a great deal of pride in it, and had trained his nephew Andy to the business, so that he could take sole charge of the bank after his death, and when he got home he expected to give over control of the bank to him. I asked him if he intended by that to give the stock of the bank owned by him *and* Andy, and he said that was his intention; that Andy should eventually be the manager of the bank, and
122 that he would leave his stock in said bank to him. He talked over this matter several times during the day, and told me twice that he intended leaving to his nephew when he died the stock held by him in the First National Bank of Butte.

123 CHARLES F. MUSSUGBROD in his said deposition testified as follows:

My age is seventy-nine years and three months, and my residence is Warm Springs, Deer Lodge county. I was acquainted with Andrew J. Davis, generally called Judge Davis, during his lifetime,

and think I first knew him in 1865 and knew him continuously up to the time of his death. We were on very friendly terms. I am acquainted with Andrew J. Davis, generally called Andy, and have known him ever since he came to Montana. He is a nephew of Judge Davis and was always in the bank with Judge Davis. I know the banking institution known as the First National Bank of Butte and have known it ever since it started.

Q. State whether or not you ever heard the Judge, Andrew J. Davis, say anything as to his intentions with regard to the said First National Bank of Butte and to said A. J. Davis, defendant, and as to what disposition the said Judge Davis intended to make of said bank or his interest therein. If you did hear him say anything about these matters or any of them, state, as near as you can, when and where it was and how he came to say anything about these matters, and what he said, and what was said by any one else at this time.

124 To which the same objection, same ruling of the court, and same exceptions to the ruling of the court as heretofore were had and taken.

A. Yes; I had a conversation with Judge Davis. The first of August, 1888, Andrew J. Davis came down to the springs—I mean young Andy—and he was at that time a very sick man. He remained in bed until the 16th of August, on which time I came up to Butte. While walking along Main street here old Judge Davis stood in front of the bank and called me in. He asked me, "Well, when will that boy be able to come up?" My answer was, "He is a very sick man. He is worked out and has not the constitution to work in your bank from morning till night." Judge Davis remarked then, "Oh, well, Dr., you know that—that we all had to work when we were young, and especially if a man works for himself." My remark was then, "Judge, as far as I know, he is not working for himself, but for you, and at very small wages at that." Then the Judge says, "Andy knows very well that that bank will belong to him some day."

That is all I can say about it, and that is every word that was used.

125 CHARLES S. WARREN, a witness on the part of the defendant, testified as follows:

I have lived in Butte 17 or 18 years. I know the First National bank and its officers, and have known it ever since its organization; knew Andrew J. Davis, generally called Judge, since 1876, and had charge of his business here for a number of years, from '77, more or less, up to his death, and saw him very frequently. I know Andrew J. Davis, the defendant, commonly called Andy, and have known him since he came to *to* Montana.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis, or as to his, Judge Davis', affections or liking for Andy? If you did, state when and where and what you heard the Judge say about these matters.

Same objections, ruling, and exceptions.

A. About a year, or perhaps a year and a half, before Andy came to this county Judge Davis told me that his brother John had a son named after him, who was cashier or collector for the Chicago Times, and that he was going to have him come out to this country. In fact, I talked to him two or three times before Andy came here.

He said that he was about 16 or 17 years old. I asked *asked*
126 him what he would do with him, and he said he would put him in the bank, and if he showed a disposition to become a banker, or ever became one, that he would bring him up in the bank and give him a working interest in it. Before Andy came here he said he had been to Chicago, or had been to New York and stopped off at Chicago, and seen Mr. Story, of the Chicago Times, about the boy, and he referred him to the business manager, and he said the- gave him a good name, and he thought he was the brightest of his brother's sons, and being named after him, he wanted to do something for him. I have talked with him often about his business qualifications, and I used to come down to his place on business matters and he was always very inquisitive about other people's business as well as his own.

Generally discussed everybody, but talked about Andy. He said he was getting along nicely and just such a man as he had long needed. This was during the years from '84 up to near the time of his death.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank stock or of his stock in it; and, if so, what did he say, when and where, and what were the circumstances of the conversation?

127 Same objection, same ruling of the court, and exception.

A. He said he had established the First National Bank of Butte and he wanted to build it up as the leading bank of the State, and he wanted it to remain in the Davis family and in the Davis name and under Davis management, even after his death. I never heard him say that he expected to die; that was the farthest from his mind, but he said "He expected the bank to fall to Andy when he did die."

The inference I got from him was that he expected, under his management, to control the bank until he died, when it should go to Andy. That was the substance of it.

128 Here the defendants introduced also the inventory and appraisement in the matter of the estate of Andrew J. Davis, deceased, for the purpose of showing the value of the estate outside of this bank.

Which was objected to as immaterial.

Which objection was overruled and said inventory admitted.

To which ruling the plaintiff then and there duly excepted.

Which said inventory, supplemental inventory, and appraisements, marked Exhibits A and B, — admitted in evidence.

And which said inventory and supplemental inventory showed

the estate of said deceased, aside from the stock of said bank, to be to the value of two million four hundred and eighty-nine thousand three hundred and ninety-three and eight hundredths ($2,489,393.08) dollars. Said inventories did not include the bank stock in controversy in this action, nor two hundred and sixteen thousand ($216,000) dollars of bonds and ninety thousand (90,000) shares of the stock of the Butte and Boston Mining Company, nor eight hundred (800) acres of improved land in Davis and Van Buren counties, Iowa, the same not having come to the hands of the administrator of said estate.

129 Hon. HIRAM KNOWLES, judge of the circuit court, ninth circuit, for the district of Montana, a witness on behalf of the defendants, testified as follows:

I reside in Missoula, Montana, and am United States district judge for the district of Montana, and have resided in Montana since August, 1869; was here in 1866, but left for a time. I have been continuously in Montana since 1868. I was acquainted with Judge Andrew J. Davis in his lifetime; got acquainted with him some time long about '70; might have known him before. I knew Judge Davis before I came to Montana. The last five or six years of his life I was quite intimate with him; perhaps as intimate as anybody was with him. I was his attorney during the last 6 years of his life. I remember the time of his death, but cannot say exactly when it occurred. It was about March 11th, 1890, as suggested by counsel. I know that he was sick here in February, but I could not have told exactly the date that he died. I was acquainted with his physical condition prior to his death. When he came home from what he called the sale off his Silver Bow property—I don't remember just when it was—he was very much out of health. He was not very well before that time; was very
130 sick afterwards and remained out of health. I know personally and from others and from what he told me that he was taking medicine all the time—that is, every day or two; he was taking medicine after that time. A few months before his death, in November, Mr. Dixon here was sick and had some damaging symptoms at that time. I had known Mr. Dixon from boyhood, and I proposed to him in November, 1889, that we go to Puget sound. I wanted to go to Puget sound, and I thought that was the best thing for him to do, so as to get out of this altitude. I went to Judge Davis and told him that I was going with Dixon. I had some papers to make out for him in a lawsuit, and as soon as I named it he said he wished to go along, and I said all right. I didn't know at this time that he was much out of health until we made this trip, when I ascertained he was troubled with insomnia very much, and on the road from here to Tacoma he slept very little. He had the annex of the state-room; Mr. Dixon and his wife had the state-room, and we had the annex. Judge Davis slept in the lower berth and myself in the upper berth. I would often find him up in the night, and he would get up sometimes before I would, when he would get up and dress himself and sit on the side of the bunk be-

low. When we got to Tacoma he would not go anywhere, and
131 even to his meals, until I went with him, and I found that he was very feeble at that time. Then we went from there to Victoria, and I think we stayed in Victoria eight days. Mr. Dixon and his wife and Judge Davis and myself took a ride every day we were there, I think. I don't think there was a day we did not take a ride, and I thought he improved some. He got uneasy and wanted to leave there after he had been there three days, but I told him I thought he was doing pretty well. He was continually taking seidlitz powders, and we tried to get him to change from taking seidlitz powders to porter. After drinking a couple glasses of porter we considered that that would not do and went and got him a drink — half-and-half and he tried that for a few days and then quit and would not drink any more. I remember one incident: The sun had come out. It had been raining most of the time we were at Victoria, and he started off for a walk. The sun was shining bright and we went with him, and we went about a half a mile straight out from the Draiad house, and the old gentlemen came very near giving out. He had to sit down where the board walk was up some distance; we had to stop and sit on that board walk, and when we got
132 back he went and laid down on his bed and claimed that his meals were sour and so on. We left there and went back to Tacoma, and I think we stayed in Tacoma 3 days, when we went back; I think we went up to Shelton. I had not slept very well and I came back, and the night I came back he was sick in the night. He rang the bell for my room, but I did not wake up and he came and woke me up. I went into his room and he was in considerable pain with his stomach, and I think—I don't know whether his bowels were in order or not, but his stomach. I got some medicine for him. I think I got some peppermint down at the bar, and I went and stayed with him that night, and he was quite feeble and he wanted to go back to Montana right away, and would not wait another day. I think that there had been an agreement while I was gone, and he was determined to go right back to Montana. We came back from here and I thought he was better, but he seemed soon to go down again. I should say it was mostly nervous derangement which caused this physical disability. Of course, part of this I can only tell from what he told me, and that is that he did not sleep. He would not sleep only one night in three, and he worried about little things. I remember sending down one morning and he had been awake and thinking that some one was going to swindle him that he had trusted, and
133 he had not slept all night. I said, "What in — is the matter? Supposing you had lost fifty thousand dollars?" He said, "It don't make any difference whether it is fifty thousand dollars or two hundred and fifty dollars. I will worry about it just the same. I cannot keep from doing it. My mind is not subject to my control at all about the matter." I was a pretty busy man in court in those days and had a lot of business in Deer Lodge, and I think he had seen Van Sant. Then he got a notion that he would like to go to the south of France and stay awhile and he offered to

pay my expenses if I would go with him. I told him I could not go, there was no use talking, and then it was finally agreed that he should go to Mexico. I recommended that for the reason that he would see a different kind of people as well — have a change of climate. He would see different houses, different roofs on the houses and I thought that would distract him, and my understanding was, when I went to Deer Lodge that he was to go to the city of Mexico. We got back to Butte in December—about the 1st of December. We were eight days, I think, in Victoria, and at the time we got to Tacoma we stayed there two or four days. Then we spent a day going to Victoria and a day coming down, and then must
134 have been as much as three days at Tacoma coming back. Then there was the time we were travelling to and from Tacoma. Well, altogether I would say we were there nearly three weeks. I have not looked at the dates or anything of that kind. We got here in December I know, because of the court at Deer Lodge. I had to be there. Think after he came back here in a day or two he got down just the same as he had been before we went down there. I was with him whenever I was there. Most always he would see me at the bank or send for me for some little thing to come down to his house. Sometimes it did not amount to anything and sometimes it was a matter of business. I would say that he declined or went back just as he was before—sleepless nights and all and in about the same condition, taking medicine every day or so. I was not here at the time he left on his last trip. I met him in Deer Lodge on his return. He must have returned some time along in February—about the 1st of February—from his second trip. It was about a month before he died. When I saw him in Deer Lodge he had failed considerably. Of course, we were in the cars and he talked very low, and it was with difficulty that I could understand his talk in the cars. I had to get right down to him.
135 He seemed glad to see me and talked a great deal. His mental condition, I thought, was perfectly sane. I thought I saw him in Butte after his return from Tacoma the second time, in February. I came up with him from Deer Lodge, and he seemed feeble and very low. He kept talking to me a good deal, but I don't think I understood all he said to me coming up. I went with him to his room that night with Andy Davis, and he said to me, "I want to see you tomorrow," and I went to see him the next day. His physical condition was bad. He had lost ground since I had seen him. There were some days he would think he was liable to die in a very short time, and other days he would think he was liable to live as long as his father. He used to always cite how old his father was when he died. His father was 84 years old, I think, and he did not see why he could not get over his sickness and live as long as his father. He had a sort of belief that he had inherited a long life, and it was one day one thing and another day another. At this time when he went up to Tacoma and some time before that he was all the time trying to straighten up his affairs, as he claimed, and fix up everything in the bank. He would go into the bank
136 and take out the bills payable to the bank and look over them and examine them all, and those that he did not think

were just right he wanted them fixed up. He wanted everything fixed up, he said. That was before he went to Tacoma and afterwards. He did not state to me for what reason he wanted them fixed up. You must remember that Judge Davis was a remarkably reticent and secretive man about himself and his affairs. He was a very good talker about other people's affairs, but he was a very secretive man about his own affairs and about himself. I did not see him just before his departure for Tacoma, in December. I know Andrew J. Davis, commonly called *as* Andy, and have known him ever since he came into the bank. I don't remember just when that Judge brought him on.

Q. Can you state, Judge, the opinion of Judge Davis, of Andrew J. Davis, Junior, as to his business capacity and as to his affection towards him?

Same objection, ruling of the court, and exceptions to the ruling of the court.

A. Well, he was accustomed to talk long the last about Andy, as he always called him, his business capacity, and in a very characteristic way. He would pump me as to my opinion about him, and then he would compare him to himself. He would say,
137 "Now, I was just a little fellow just like Andy, and he will come out all right."

This was owing to the fact that Andy's father was all the time saying, "Andrew, you are killing Andy. You are putting too much on him, and you are going to kill him." The old Judge would say, "You just let that boy alone; he has got more business sense than you have got. Now, just let him alone; he is coming out all right." Of course, I know he had a good opinion of his business capacity or he would not have put him in as cashier of the bank. "As to his affection, I think that Andy is the only person that I ever knew Judge Davis to exhibit any particular warmth or affection towards. He was a man that had few friendships, and Andy was one of his particular favorites. If he was sick he was always uneasy. He was sick in the bank here once. He had a room in the bank, and the Judge would go in and look at him, and he would not say anything particular to him, but he would rush right off and see the Dr. and ask him about what he thought of Andy, and ask if he was very sick or something of that kind, and he seemed to feel differently towards Andy than to any one else that was around him."

138 Here the witness was permitted to testify with reference to such matters as he did not consider professional or that he had obtained in a professional way, subject to the objection, ruling of the court, and exceptions as heretofore.

A. Judge Davis was quite sick, and I had gone in there and talked with him about his trip and his health, and he said, "I wish to make some presents." He went on and stated that he wanted to know if I thought he was sound enough in mind to make these presents, and he had a long talk about any probability about his going insane, and I went on and discussed with him what I had

read on these subjects of insanity and brain diseases. The conversation was probably an hour long, and in this conversation about the presents he first said he wished to give ten thousand dollars to the public library of Butte. Andy wanted him to, and he understood that Charlie Larabie had given ten thousand dollars, and he wanted to give ten thousand dollars to meet that. Then he said there was a lady here whose husband had helped him considerably, and he wanted to make her a present, though he said he had paid him for everything that he had done, that he asked, but he wanted to make her a present. He said something about W. E. Wehtsraur's
little girl, but exactly what was said about that I
139 don't remember. Then he said there were two persons in the States that he wanted to make presents to, and in this conversation he said, "Andy is to have the bank, or control of the bank." I don't know which now; or he might have said both. That was all that was said particularly about Andy in that conversation—that is, as far as that matter is concerned. The balance of it led up *the* a legal matter. The interview was to be renewed. He was not to attend to any business or go up to the bank or anything of that kind and in three days from that time I was to be there and we would straighten up his affairs. I went back at the second time. At that time he was insane. He would have done anything that I said. He would have signed any paper or anything like that, but he was out of his head, discussing business in a very philosophical way, giving his views about running banks and everything of that kind, and how they should be run, some of which views I think would be pretty good for some men to follow now.

Q. In this conversation with reference to Andy did he say that he wanted to give the bank to Andy?

A. He did not. He said, "Andy is to control the bank," or "to have the bank," and I think he may have said both, because
140 this conversation was fully an hour long, and I don't know but more. He never was sane afterwards, and died of this illness.

Q. What have you to say with reference to Judge Davis dying with the same illness that he had there up to your trip to Tacoma with him?

A. While that is really in the line of a medical question, if you should ask my judgment about it, I should say that that disease started on his return from the sale of the Silver Bow properties to Butte and Boston company.

When he came back it was a week before we could find out what he had actually done, and I had to write a letter to Mr. Beaman, of New York. Before I had got that letter he had straightened out and he told me that he had had a chill somewhere in New York at that time, and he came back very feeble. He never gained his strength after that time. That was after he came back. I don't remember the day. I think it was about a year before his death.

Cross-examination.

By Mr. TOOLE:

Q. This conversation that you refer to in which he spoke of
141 giving Mrs. Wehrspaun's daughter something, and also to the library ten thousand dollars, and also something to the lady here, and also that Andy was to have the bank or control the bank, was after his return from Tacoma, was it?

A. The last time; yes. It was his last trip to Tacoma.

Q. I believe you say that it was understood that you were to return within a few days and fix up these matters for him?

A. No; it was not to fix up those gifts exactly. The return was with a view of writing a will and fix everything in that way.

Redirect examination.

By Mr. DIXON:

Continuing, the witness said: My object for returning then was to draw a will. That was the legal matter that came up. The other matter was my opinion as to his physical condition and capacity to make these presents that he was going to make.

By the COURT:

Q. I would like to ask the witness a question about his statement if there is no objection to it on the part of the counsel?

Consented to by all parties.

142 By the COURT:

Q. The statute provides that an attorney or counsellor shall not, without the consent of the client, be examined as a witness as to any communications made by the client to him or his advise given thereon in the course of professional employment. The question I desire to ask is whether or not the statement which you say Judge Davis made to you with reference to Andy and the bank—in other words, his statement that Andy was to have the bank or was to have the bank and control the bank—was made in the course of professional employment by you with Judge Davis.

A. I did not so consider it, Judge, and I made no charge for it. I considered it was a personal matter, arising out of the personal relations that had existed. I may say it became very difficult along to the last in my intercourse with Judge Davis to distinguish between what would be personal and what would be a matter of attorney, because he came and talked to me about a great many things that pertain not at all to business, legal business, or required any looking up in legal matters. Now, the fact of his going with me down to Tacoma and I looking after him and everything of that kind could not be considered a legal matter, but a personal mat-
143 ter, and this interview with him I made no charge for, and I always charged him for everything. If I drew up a deed or a power of attorney or anything, I made a charge for that.

By the COURT:

Q. Do you know, from anything that he said, whether he considered that he was consulting you at that time with reference to this particular matter which I have inquired about in the capacity of an attorney or in the capacity of a friend?

A. No; he was consulting me, undoubtedly, in the capacity of a friend, to give him an opinion as to his mental capacity at the time to make these presents. It was not a legal matter; there was nothing said in any way, shape, form, or manner about how to make these presents. The truth is that I didn't want him. You may say that I was anxious that Judge Davis should fix up his matters with a will at that time, and it lead finally up to that proposition.

By Mr. FORBIS:

Continuing, the witness said: He did not ask me about a will or making any will, but it was about making these gifts, and whether I thought he was mentally capable of making these gifts.

144 By Mr. TOOLE: We have no desire to interpose any objection to the testimony on account of the relation of attorney and client, and we withdraw all objections already made on that account.

By Mr. TOOLE: We desire to ask Judge Knowles a question on our own part, and as he desires to go away, by consent of court and counsel we will do it now. It is simply for the purpose of proving this proxy and having it identified by the witness.

Here the proxy of Judge Davis to John E. Davis was identified and was considered thoroughly identified for the purpose of being admitted in evidence by agreement of counsel.

Q. Take this proxy. Do you remember that meeting of the stockholders on the 14th of January, 1890? I mean the first stockholders' meeting that was held after Judge Davis left on his last trip to Tacoma?

A. I don't remember about the meeting, but suppose the minutes will show what was done and whether I was there. I am not sure that I was there.

Here the witness was handed the proxy of Judge Davis to John E. Davis, authorizing him to act as his proxy at any stock-
145 holders' meeting of the bank, and the witness stated that it was Judge Davis' signature to the proxy and said, I am President of the First National Bank of Butte.

146 W. C. DARNOLD, being a witness for the defendants and being examined by J. W. Forbis, one of the attorneys for the defendants, testified:

I reside in Butte and have been here and in the vicinity of Butte for about 8 or 9 years, for the last six months. I resided here before coming here in 1883 and went to work for the First National Bank of Butte. I commenced on the 29th of August, 1883, and quit on the 26th of August, 1886. I was acquainted with Andrew J.

Davis, commonly called Judge Davis, during his lifetime. I knew him from that date up to his death. I was in his employ for three years, just mentioned in the bank, and subsequently in his employ in connection with J. R. Boyce, Jr., and Company as book-keeper. I was quite well acquainted with him. I remember his return from Tacoma in 1890. I saw him after his return and had a conversation with him relative to Andy and the First National bank.

Same objections, same ruling of the court, and same exceptions to the ruling of the court entered as heretofore.

I made an application to him for a place in the bank, in which he told me, knowing that I was an enemy of Andy's—
147 then, he says, well, I lost my position with J. R. Boyce & Co., and I says I was out of my position and out of money. The Judge had always been very favorable to me when I was in his employ and I thought I could get back in the bank, so I made application to him somewhere between the 1st and the 6th of February. At that time he told me that he had given the bank stock to Andy Davis and had not any control over it. Knowing that I was an enemy of Andy's, he said he could not do anything, but he said when he got up he would help me. He did not say he would put me in the bank.

By the COURT:

Q. When was this?
A. Some time between the 1st and the 6th of February, 1890.

By Mr. FORBIS:

Q. What was the Judge's condition at that time?

By the WITNESS:

A. He was very low, very weak. He could only speak two or three words and would keep quiet for a moment or two, and then would speak again, rather insinuating to me by what he said that I had better make my interview short.

Q. State what he said.

A. Well, he said he was not strong enough to talk much, and that he would do something for me when he got up, and
148 then he subsided, and then did not say anything more.

It was just about the time of his return. It was a very few days after his return. It may have been 4 or 6 days. The interview lasted a few minutes, probably not over 15 minutes—10 or 15 minutes.

Cross-examination.

By Mr. TOOLE:

Continuing, the witness said:

I don't know the dates; I only judge from the fact that my last work with J. R. Boyce, Jr., & Co. was the 31st of January, and it was after that time, because I was discharged but very shortly after-

wards, because I made this application just as soon as I was discharged. I was in his house on Broadway. I could not say exactly what time—some time in the fore part of the month.

Q. You know if for the reason that you immediately after you ceased your employment with J. R. Boyce & Co.—you called there to see him with reference to this object that you wanted?

A. To this situation back in the bank again, where I had been. There was a lady there at the time. I think it was Mrs. Wehrspaun; she let me in. I don't think she remained in the
149 room at the time of this conversation. She may have been in, but I did not pay any attention to her until after I went in the room. The Judge had only been back here a few days, cannot say how long, when this conversation occurred; probably four or five days, maybe less. I don't know what time of day it was it occurred; it was during daylight. I am not sure whether it was in the forenoon or afternoon; cannot say whether it was after the shades of evening had come on, but it was during daylight—bright daylight—because it was not dark or anything of that kind. I think Mrs. Wehrspaun was in there at the time the conversation commenced. I am not certain that it was Mrs. Wehrspaun. It might possibly have been her daughter or somebody else. He said he had given the bank stock to Andy or the bank business to Andy, and that he hadn't any control of the position that I asked for, but that he would do something for me when he got out.

He knew that Andy and I were enemies, you know. I don't know how long it had been before that that Judge Davis had been looking after any of the bank business. He had been gone for a long time. I think about the time he went away he was looking after the bank business—that is, he was in and out of the bank; possibly up to the time that he left. I, being employed about
150 other business, did not know. Prior to my interview with Judge Davis I was in the employ of J. R. Boyce, Jr., & Co. I had been living in the family of Mr. Boyce. I had been stopping at Mr. Boyce's and sleeping there and eating there sometimes, and sometimes downtown. No one has been paying me anything to remain here. No one has been paying me anything for any purpose. Mr. Andrew J. Davis has not paid me a cent. I had not received anything from him; not anything at all. He has made no promise to pay me any money. I came back here to Butte about the middle of October—that is, when I came back here last. I have been engaged in no business since I came here; no business at all. I have not been enabled to get in any business. I have been just living with Mr. Boyce. I have not been able to get anything to do. I have always been a book-keeper. I never told anybody else what had transpired. I never told Mr. Boyce or Mrs. Boyce what had occurred. I never mentioned it to them. I never said anything to them about what I heard Judge Davis say in reference to that bank or bank stock. I never said anything to either one of them about it. I am positive about that. I have no recollection of doing so anyway.

Q. Did you have any conversation recently with Mr. Boyce or Mrs. Boyce about this matter?

A. Only in a general way—at the table and around the
151 house, but nothing in which I said anything about what my testimony would be.

Q. Did you say anything to them about your testimony being the last and that it would be a clincher or something to that effect; that it was reserved to the last and that it would be a clincher?

A. I don't recollect saying it. If I had said it I would recollect it positively. I have no recollection of saying it.

Q. Would you recollect it if you had?

A. I think I ought to, but I don't recollect it.

Q. Will you say you did not say it?

A. No; I won't say I did not say it, because I don't recollect of saying it.

Q. Did you tell Mr. Boyce about expecting to receive anything for staying here?

A. No, sir.

Q. Nothing of that sort?

A. No, sir.

Q. Mr. Darnold, did anybody push you out of the house there at that time when you had this conversation that you speak of?

A. Push me out of the house? No, sir.

Q. Are you sure of that?

152 A. I am sure of that; nobody pushed me out of the house. My intimation was Judge Davis was not able to talk.

Q. Did you say to Mrs. Boyce that when you were having this conversation with him somebody pushed you out of the house?

A. No, sir.

Q. Or out of the room?

A. No, sir.

153 JAMES A. TALBOTT, plaintiff, recalled on behalf of the defendant-, testified as follows:

I am familiar with the stock of the First National Bank of Butte—the certificates, I mean. The certificates you hand me are certificates of stock of that bank.

Q. Do you know the signatures—A. J. Davis and A. J. Davis, Jr.?

A. Yes, sir.

They are their respective signatures and this is the seal of the bank to them. There *is* some here, I see, that Mr. Hyde signed. These are the same certificates about which I testified upon yesterday. I testifies upon yesterday that these certificates had a blank transfer assignment upon the back. I thought then they had, but see now that they had not.

Here the certificates offered in evidence by the defendant-, being certificates of stock of the First National Bank of Butte—certificate No. 10,481 shares; certificates No. 14,343 shares; certificates No. 22, 116 shares, all signed by Jos. A. Hyde, cashier, and A. J. Davis,

president; certificate No. 25, 10 shares, signed by A. J. Davis, Jr., cashier; Andrew J. Davis, president.

(Here insert the certificates of stock.)

If I testified upon yesterday that Judge Davis was in Butte from September until he went to Tacoma a day or two after the
154 conversation between him and Andy about the stock, it was a mistake, because he went down with Judge Dixon and Judge Knowles between September and that time. It must have been in October or November some time that he went down.

155 JOHN E. DAVIS, a witness on the part of the defendants, testified as follows:

I reside in Butte and have lived there since 1884; am a brother of Andrew J. Davis, the defendant in this action, and a nephew of Judge Davis. I attended a meeting in January, 1890, of the stockholders of the First National Bank of Butte and voted the stock as proxy for Judge Davis.

Looking at the proxy, the witness says: This is the proxy made out that time and which I voted. I voted it at that meeting and under the proxy.

Q. For an election of officers or directors?

A. Directors, I think.

Q. By whose direction or at whose suggestion did you vote for these officers?

By Mr. TOOLE: We object as improper and incompetent.

By Mr. KIRKPATRICK: We introduce this proxy for two purposes: to show that the date of it antedates the date of the alleged gift, and also to show that the actual domain of the stock was exercised by the beneficial and equitable owner of the stock, Andy Davis, instead of, as the plaintiff claims, by the owner of the legal title.

156 By Mr. DIXON: I would like to offer the proxy in evidence.

Which proxy was admit-ed without objection and is marked Exhibit C.

Proxy.

"I do hereby constitute and appoint J. E. Davis, of Butte city, in the county of Silver Bow, State of Montana, my lawful proxy for me and in my name to vote nine hundred and fifty shares of the stock of the First National Bank of Butte, owned by me and standing in my name on the books of said bank, at the annual meeting of the stockholders thereof to be held for the election of directors on the fourteenth day of January, A. D. 1890, pursuant to law. I hereby ratify and confirm whatsoever the said J. E. Davis may lawfully do by virtue hereof, and I hereby revoke and annul all authority heretofore given by me authorizing any person for me or in my name to vote any of the stock in said bank.

In witness whereof I have hereunto set my hand and seal this 24th day of December, A. D. 1889.

(Signed) A. J. DAVIS."

157 Objection to last question overruled; to which ruling of the court the plaintiff then and there duly excepted; which exception was duly and properly entered.

A. At Andy's.

By Mr. TOOLE: I will ask that that answer be stricken out for the following reasons:

1st. There is no authority to vote the stock under the laws of the United States and the by-laws of the bank except that given by the deceased, in whose name it stood upon the books of the bank.

2nd. It does not appear that the attempted control of any one else or the assumption of the agent to act under the proxy for any one else was known to or acquiesced in by the deceased, so as to be binding upon him in his lifetime or binding upon his executors or administrators.

3rd. Because the assumption so to act is based upon the declarations or request of A. J. Davis and not in the presence or hearing or knowledge of the deceased, and is not binding on him or his executors or administrators.

158 4th. It is not admissable as an act of Andy's on his own behalf, because inconsistent with the power conferred under which the act was done.

The said motion, being considered by the court, was overruled, and to which ruling of the court in not striking out the said answer and testimony of said John E. Davis with respect to instructions given him by Andy the said plaintiff then and there duly excepted, and his exceptions were duly entered according to law.

I never had any conversation with Judge Davis in regard to this proxy or any direction from him as to what officers and directors I should vote for under it. I received that proxy at the time of the meeting from Andy and voted it, and after I voted the proxy I handed it back to Andy. The body of the proxy is Andy's handwriting.

Cross-examination.

By Mr. TOOLE:

It came into my possession at the bank at the meeting of the stockholders. That was the first time I ever seen it. It was given to me by Andy. I acted under this proxy. I voted the stock that stood in the name of Andrew J. Davis (Judge Davis) under this proxy. I suppose I voted 950 shares of stock, the same as
159 the proxy calls for. I voted just according to the proxy. I don't remember for whom I voted for president. I voted the way Andy told me to. I don't remember whether I voted for Judge Davis for president or not. He was not elected at that meeting. This was a meeting of *of* stockholders, as I understand it. I don't remember whether I voted for him for director or not.

Q. This seems to have been filled in there with a kind of purple ink—that is, the name of John E. Davis. In whose writing is that?

A. That is Andy's.

Q. The signature of Judge Davis also seems to be in purple ink?

A. Yes, sir.

Q. In different ink from the body of the instrument, is it not?

A. Yes, sir.

Q. Do you know anything about when this proxy was *was* really signed by Judge Davis?

A. No, sir.

Q. Do you know whether it was signed in this town or Tacoma and returned here?

A. No, sir.

Q. The date of the proxy is in the same ink as the body of it, is it not?

160 A. I think so, yes; if I remember right.

The signature and filling in the name of J. E. Davis is in purple ink.

Redirect examination.

By Mr. DIXON:

The body of the proxy is in Andy's writing. The name of J. E. Davis occurs in the body of it in two places in purple ink, both in purple ink and both in Andy's writing, so that the whole body of the proxy is in the same writing, but my name is in different ink or different-colored ink. My name in the proxy is written with the same ink as that of Judge Davis.

Here the defendants, having the affirmative of this case, rested.

161 Plaintiff offered in evidence the books and minutes of the bank—the deed mentioned by Mr. Talbott—for the purpose of getting at the date of the alleged gift, and the by-laws of the defendant bank were also admitted in evidence.

Which were as follows, to wit:

162 *By-laws of the First National Bank of Butte, M. T.*

Adopted at the directors' meeting held in September 12, 1881.

General Form of By-laws.

1.

The regular annual meeting of stockholders of this bank for the election of directors and for the transaction of other legitimate business shall be held between the hours of ten o'clock a. m. and four o'clock p. m. on the day specified in the articles of association, viz., the second Tuesday in January of each year, and the thirty days' notice of the time and object of such meetings thereby required shall be given by the president, vice-president, or cashier by publication in one or more papers in the city of Butte. The board of directors shall, within one month previous to the date fixed for such meetings, appoint three stockholders to be judges of the election for directors,

who shall hold and conduct the same and who shall under their hands notify the person acting as cashier of this bank of the result thereof as soon as ascertained and of the names of the directors-elect.

163 2.

The person acting as cashier shall thereupon cause the return made by the judges of election to be recorded upon the minute book of the bank, and shall notify the directors chosen of their election and for the time for them to meet at the banking-house for the organization of the new board. If at the time fixed for such meetings there should be no quorum in attendance the directors present may adjourn from time to time until a quorum shall be obtained.

3.

The directors-elect shall meet for organization upon the notification given in accordance with law 2 within one week from the time of their election, but shall not do any business whatever prior to qualifying by taking the oath of office as required by law.

4.

If the annual election for directors should not be held on the day fixed by the articles of association the directors in office shall order a special election, of which notice shall be given, judges appointed, and returns made and recorded upon the minute book, and the directors chosen thereat shall be certified to the cashier and notified as provided by by-laws 1 and 2.

164 5.

The officers of the bank shall be a president, cashier, assistant cashier, and book-keeper, and such other officers as may be required from time to time for the prompt and orderly transaction of its business, and all the officers, clerks, and agents shall be elected, appointed, or employed by the board of directors, or with the consent thereof, and their several duties may be prescribed by the board.

6.

The president shall hold his office for the current year for which the board of which he shall be a member was elected, unless he shall resign, become disqualified, or be removed, and any vacancies occurring in the office of the president or in the board of directors shall be filled by the remaining members.

7.

The cashier and the subordinate officers and clerks shall be appointed to hold their offices, respectively, during the pleasure of the board of directors.

8.

The sashier of this bank shall be responsible for all the monies, funds, and valuables of the bank, and shall give bond, with security

to be approved by the board, in the penal sum of twenty-five
165 thousand dollars ($25,000), conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all of such monies, funds, and valuables, and deliver the same to the order of the board of directors of this bank or to the person or persons authorized to receive them. The assistant cashier shall assume all the duties and responsibilities of the cashier in his absence, and shall give bond in the sum of twenty-five thousand dollars ($25,000.00) for the faithful discharge of such duties.

9.

The president of this bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the board of directors or by the cashier, or otherwise come into his hands as president, and shall give bond, with security to be approved by the board, in the penal sum of — dollars, conditioned for the faithful discharge of his duties as such president, and that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such president, and pay over and deliver the same to the order of the directors or to any other
166 person or persons authorized by the board to receive the same.

10.

The bonds of the officers shall be placed in the custody of the stockholders of this bank to be designated by the board of directors, who shall not be one of the bonded officers, to be surrendered by him only upon the order of the board.

11.

The impression made below is an impression of the seal adopted by the board of directors of this bank.

[SEAL.]

12.

All transfers and conveyances of real estate shall be made by the bank under the seal thereof, in accordance with the orders of the board of directors, and shall be signed by the president or cashier.

13.

Whenever an increase of stock shall be determined upon in accordance with the articles of association of this bank it shall be the duty of the board of directors to cause all the stockholders to be notified thereof and a subscription to be opened thereof specifying the terms of payment agreed upon by the subscribers. Each stockholder shall be entitled to subscribe to shares of the new
167 stock in proportion to the number of shares he already owns, but if any stockholder shall fail to subscribe to such new stock as he may be entitled to or to pay his subscription according to agreement, the board of directors shall determine what disposition

shall be made of the privileges of subscribing for the new stock not taken.

14.

This bank shall be open for business from nine o'clock a. m. to three o'clock p. m. each day except Sunday and days recognized by the laws of this Territory as holidays.

15.

The board of directors of this bank shall hold regular meetings at the banking-house for the transaction of business on the first Monday of each month, and should that day in any year fall upon a holiday the regular meeting for that month shall be held on such other day as the directors at the preceding meeting shall order.

16.

The board may also hold special meetings upon the call of the president, cashier, or any three or more members, and whenever there shall not be a quorum at a regular or special meeting
168 the members present may adjourn the meeting from day to day until a quorum shall be obtained, and any meeting may be adjourned from time to time by a vote of a majority of a quorum present, but no business except adjournment shall be transacted in the absence of a quorum.

17.

There shall be a committee to be known as the discount committee, consisting of the president, one director, and cashier, who shall have power to discount and purchase bills, notes, and other evidence of debt and to buy and sell bills of exchange, and any one of the said committee objecting to the discount or purchase of any paper shall be a refusal of said paper. Two of said committee shall be a quorum for discount.

17.

The board of directors may appoint one of its members or an officer of the bank to act as clerk at its meetings.

18.

The earnings of this bank shall be disposed of according to orders of the board of directors made at regular or special meetings, and no dividends shall be paid to stockholders or other disposition of earnings made except upon an order of the board.

169 19.

The organization papers of this bank, as executed and filed with the Comptroller of the Currency, the returns of judges of the election and proceedings at all regular and special meetings of the board of directors, the by-laws and all changes and all amendments thereof, and the report of all examining committees or directors made ac-

cording to law 26, shall be recorded in the minute book, and the minutes of each meeting of the board shall be signed by the president and attested by the cashier.

20.

The board of directors shall have power to prescribe and, when expedient, to change the form of books and accounts to be used in the transaction of the business of this bank and to prescribe in general or particular the manner in which its affairs shall be conducted.

21.

The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the restriction- and provisions of the banking laws, and transfer book shall be provided, in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board of
170 directors by any stockholder who shall be liable, either as principal debtor or otherwise.

22.

Transfers of stock shall not be suspended preparatory to the declaration of dividends, and, unless an agreement to the contrary shall be expressed in the assignments, dividends shall be paid to the stockholders in whose name- the stock stand- at the date of the declaration of dividends.

23.

Certificates of stock, signed by the president and cashier, shall be issued to stockholders, and the certificates shall state upon the face thereof that the stock is transferrable only on the books of the bank.

24.

All the current expenses of this bank shall be paid by the cashier, who shall every six months or oftener, if required, make to the board of directors a statement thereof.

25.

All contracts, checks, drafts, &c., for this bank and all receipts for circulating notes received from the Comptroller of the Currency shall be signed by the president or cashier.

26.

171 There shall be appointed by the board of directors every six months a committee of three members thereof, whose duty it shall be to examine into the affairs of this bank, to count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith, and whether the bank is in a sound and solvent condition, and to recommend to the board such changes in the manner of doing busi-

ness, &c., as shall seem to be desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter.

27.

The vice-president shall, in the absence of the president, assume all the duties and responsibilities of the president.

28.

A majority of the directors shall be a quorum to do business.

29.

A copy of the by-laws of this bank, as in force, shall be kept in a convenient place in the bank, to which any stockholder shall have free access during the regular hours of business.

172 30.

These by-laws may be changed or amended by a vote of two-thirds of the directors.

BUTTE CITY, MONTANA, *Jan'y 14th*, 1890.

Pursuant to the following notice, published in the Daily Inter-Mountain, the stockholders of the First National Bank of Butte met in the parlor of said bank this day at three thirty p. m. for the purpose of electing directors to serve the ensuing year.

Annual Meeting.

The regular meeting of the stockholders of the First National Bank of Butte will be held at the office of said bank on Tuesday, January 14th, 1890, between the hours of ten a. m. and four p. m.

ANDREW J. DAVIS, JR., *Cashier.*

Dated Butte city, December 9th, 1889.

Present: Andrew J. Davis, by proxy to J. E. Davis, Hiram Knowles, and A. J. Davis, Jr.

On motion, Hiram Knowles was chosen chairman and Andrew J. Davis, Jr., secretary.

On motion, duly carried, it was resolved to proceed to the election of directors, and Hiram Knowles and John E. Davis were chosen judges of the election, who announced the following directors duly elected, receiving nine hundred and seventy votes each: Andrew J. Davis, Hiram Knowles, S. T. Hauser, W. W. Dixon, James A. Talbott, A. J. Davis, Jr.

The meeting then adjourned.

ANDREW J. DAVIS, JR., *Sec'y.*

Attest: HIRAM KNOWLES, *Chairman.*

173 J. R. BOYCE, JR., a witness on the part of plaintiff, testified as follows: I reside in Butte and have lived here for about fourteen years, and have been at the ranch off and on; call Butte

my home, and am acquainted with C. W. Darnold, and have known him since 1868 or '70.

Q. Did you have any conversation with him in the presence of Mr. Wellcome, in Butte city, with reference to what he knew in regard to the statements of Andrew J. Davis, deceased, about disposing of the stock or bank stock known as the First National Bank of Butte?

A. I was present at a conversation that occurred in the office some time in December, I think it was about 1893.

That is — near as I can come to dates. I was residing at the ranch at the time, and Mr. Darnold was in the office with my father. They were checking up the books in the office of Mr. Wellcome during that month. It was prior to Christmas. I don't remember the exact dates, but it was possibly between the 16th and 25th. I was in there several times while they were checking. The conversation was in the presence of Mr. Wellcome, in this city, in his office.

Q. State what was said to you and Mr. Wellcome — refer-
174 ence to what he knew and expected to testify as a — in this case.

A. Well, he said that he had heard Judge Davis. That was along in the year 1887. He heard Judge Davis say that he intended the bank for Andy.

Q. Did he say anything about being subpœnied or expecting to give his testimony in this case on the part of the defendants?

A. I think not at that time.

Q. Did he at any time?

A. Recently he has.

Q. How recently?

A. Well, it was only in the last two weeks, I guess.

Q. Did you talk with him within the last two weeks about what he knew ab-ut this case?

A. Yes, sir.

Q. State to the court what occurred.

A. Well, he said that he would testify and he would be the last witness to testify in this case.

Mr. DIXON: We object to this; it is not what this witness was produced for. Mr. Darnold was asked about this before.

—. I will ask you this question, Mr. Boyce: You say you had
175 a conversation with him in this city within the last two weeks with reference to what he expected to testify in this case?

A. Yes, sir.

Q. Did he say to you in that conversation substantially that all he knew about this case was what Judge Davis had told him in 1887?

A. That was all he ever stated to me, what he had formerly stated, and that was what had occurred in 1887.

Q. Did he say to you that was all he knew about the case?

A. Well, he didn't state to me what he was going to testify to at

all. That was all he gave me to understand he knew about the case.

By the COURT: You were asked to state his statements to you, not what you understood.

By the WITNESS:

A. Well, he said he would be called as a witness, but he did not state, of course, what he would testify to.

Mr. TOOLE:

Q. He said he would be called upon to testify?

176 A. Yes, sir.

Q. Did he say to you what his testimony would be?

A. Not at that time. A. Nor did he say what his testimony would be, because he did not know he was going to testify until this conversation.

Q. Did he tell you what he knew about this case?

A. He did.

Q. Did he tell you what he did know?

A. That he heard the Judge say that he intended giving the bank to Andy.

Q. When did he say this occurred?

A. That was in 1887.

Q. Mr. Boyce, I will get you to state to the court how long Mr. Darnold remained in the employ of J. R. Boyce, Jr., as shown by your books and of your own knowledge.

A. He entered our employ in July, 1887, and continued in our employ until the 1st of March, 1890, or about the 1st of March, 1890.

Q. For whom was he employed during the 1st of Feb., 1890?

A. He was in the employ of J. R. Boyce, Jr., & Company, according to his entries on the books.

177 Q. How, according to your knowledge, then?

A. Well, according to my memory, he was there.

Q. Up to what time?

A. Until the 1st of M-rch, 1890.

Cross-examination.

By Mr. FORBIS:

I was present here during Mr. Darnold's testimony and heard it all, and knew what he testified at that time. I heard all the conversation excepting a very small part of it. I was talking to Col. Sanders during a short interval, but I heard it in the main. I heard Mr. Darnold testify about what Judge Davis told him after his return from Tacoma. I was here during the whole of the trial. I was not subpœn-ed as a witness. No subpœna was served on me. I was not present at the request of any one, but just listening. Mr. Darnold told me that he had a conversation with the Judge in 1887. He never told me that he didn't have any other conversation with him relative to this matter. He simply told me of that conversation.

He did not tell me that he was going to testify to anything else except that conversation. When he told me two weeks ago
178 that he was going to testify as to the Judge's intentions I testified to that. He never told me that that was all he was going to testify to. He did not say whether he knew anything else or not. Mr. Darnold left my employ about March 1st, 1890. I recall it from the books. He made all the entries upon the books. He never made but few entries after the 1st of February, and during the entire month, I believe, his entries are not in the books.

Q. There are some entries.

A. No. I think they are all his entries through the month of February and up till about the 7th of March.

Q. Have you the books with you?

A. No, sir. I have them at my house in town.

Q. Did Darnold make any entries in those books after he was discharged?

A. I think not. I am not sure.

Q. Isn't it a fact that Mr. Darnold did come in occasionally and make entries there after he was discharged?

A. Well, I couldn't say for a fact with regard to that. He may have been consulted by the ass't book-keeper in regard to some matters; but the books would show.

179 The books that were kept by Dar-old were the books of J. R. Boyce & Co.—cash and day book, cash book, journal, day book, and ledger. I don't think I notified Darnold on the 1st of February that he was to be discharged. His discharge was very sudden. I don't think that he knew he was going to be discharged. I didn't think that he was going to be discharged myself.

Redirect examination.

By Mr. TOOLE:

Q. Who took Mr. Darnold's place when he was discharged?

A. Mrs. Johnson.

Q. In whose handwriting, then, do the books appear to have been made from the time that she took the place of Mr. Darnold?

A. In her handwriting. There might be possibly an entry where he—I don't think that he made any himself, but he may have dictated to her and assisted her a little. I think he did assist her a little, but probably didn't make an entry.

He has been going through our books recently; not an entry has been made in them. He has just been examining them.

The foregoing comprises all of the testimony on the trial of said cause.

180 *Bill of Exceptions.*

Title of Court and Cause.

Be it remembered that on the 23d day of May, 1894, plaintiff in the above-entitled cause made his request in writing that the court

make certain findings of fact and conclusions of law, separately and severally; which requests were in words and figures as follows, to wit:

Now comes the plaintiff and requests the court to make the following findings, or findings upon the following matters, viz:

1. Was there any written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the alleged gift?

2. Was there any written authority executed by the donor of any kind empowering the defendant Andrew J. Davis, or any other person for him, to *perform* said stock certificates of stock upon the books of the bank during the lifetime of the donor?

3. Was there any transfer, with or without such authority, of said stock or the certificates thereof to the defendant Andrew J. Davis upon the books of said bank during the lifetime of the donor?

181 4. Did anything represent the donor as a proxy at any meeting in question after the alleged gift and prior to his death?

5. Did the donor act as a stockholder of said bank after the alleged gift?

6. Was the donor elected as president of said bank at a meeting of the stockholders thereof after said alleged gift, and did he hold said office up to the time of his decease?

7. Was there any gift from the donor to the defendant Andrew J. Davis made or attempted to be made other than that alleged to have been made on the 27th or 28th of December, 1889, or at any times specified in the testimony of the witness James A. Talbott?

8. Was the donor contemplating making a trip or a journey at the time the alleged gift was made?

9. Was this a condition attached by the donor to said gift at the time of making the gift, that is to say: "If I don't come back or anything happens, I want you to have that stock"?

10. Was said gift to take effect prior to the death of said donor?

11. What was the exact language of the donor in making or attempting to make said alleged gift?

182 12. If any valid gift *mortis causa* was made, when was it made?

13. If the alleged donee exercised any dominion or control over said stock, did he do so with the knowledge or consent of the alleged donor other than such as is to be inferred from the alleged gift made on the 27th day or 28th day of December, 1889?

14. If he did exercise any such dominion or control, in what way did he do so?

15. Was any possession of said stock delivered to said donee other than that conferred by the alleged gift on the 27th or 28th day of December?

16. If any other possession was given him, in what was it given?

And as matter of law plaintiff requests the court to find:

1. That said alleged donee did not become a shareholder by said

alleged gift under the statutes of the United States and by-laws of the bank made in pursuance hereof.

183 2. That said alleged donee did not succeed to the rights or liabilities of the deceased under said statutes and by-laws.

3. That said donor was not divested of his possession, dominion, and control of said stock under said statutes and by-laws or otherwise.

4. That the alleged gift, being made upon a condition precedent, was inoperative and cannot be aided by a court of equity so as to make it effectual.

5. That the title, control, and dominion over said stock not vesting immediately, but upon a future contingency, by its express terms, was invalid as a gift *mortis causa*.

6. That the legal title and control and dominion over said stock remaining in the alleged donor at the time of his death, the same vested in the plaintiff as administrator, under the statutes of the United States, who now holds and possesses the same.

7. That said defendant, Andrew J. Davis, is not entitled to have an assignment and power of attorney from the said plaintiff as such administrator authorizing a transfer of said stock upon the books of the bank, nor is he entitled to such transfers of said stock.

8. That under the common law of England, as adopted by the State of Montana, no valid *causa mortis* was made of said stock.

Filed May 23rd, 1894.

184 And the said plaintiff also filed his motion for decree herein, which — in words and figures as follows, to wit:

Title of Court and Cause.

Now comes the plaintiff in the above-entitled action and moves the court for judgment and decree in his favor upon the evidence introduced herein, and that said Andrew J. Davis, Jr., take nothing by his said answer and cross-complaint, and that the said decree direct the said bank to transfer the stock involved in this controversy to said plaintiff, in pursuance of the prayer of his complaint, for the following reasons, to wit:

185 1.

Because the evidence in said cause will not authorize a decree requiring an assignment of said certificates or a transfer of said stock to defendant Davis.

2.

Because, if the same is insufficient otherwise to authorize a transfer of said certificates of stock or to make said defendant, Davis, a shareholder in said bank, it is utterly insufficient under the statutes of the United States applicable thereto.

3.

Because — the laws of the United States applicable thereto said defendant, Davis, has neither the legal title or beneficial interest in

the shares of stock of said defendant, First National Bank of Butte' and because the plaintiff herein claimed the right thereto under said statutes.

4.

Because the rights of the plaintiff and defendant Andrew J. Davis, as well as to dates and obligations of defendant bank, arise under the laws of the United States.

5.

186 Because the manner of becoming and rights and liabilities of shareholders are involved, which are created by and arise under the laws of the United States and must be determined by the interpretation thereof.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN, AND
TOOLE & WALLACE, *Attorneys for Plaintiff.*

Filed May 23rd, 1894.

And thereafter, on the 24th day of May, 1894, said cause was argued and submitted to the court, and on the 26th day of May, 1894, the court refused to and did not make the findings of fact or conclusions of law as requested by plaintiff, and to which action of the court in so doing, as to each of said requests separately and severally and as a whole, the plaintiff then and there and at the time duly excepted in open court.

And the court, on the last day aforesaid, overruled plaintiff's motion for judgment; to which plaintiff then and there and at the time, in open court, duly excepted.

And on the said 25th of May, 1894, said court made the following findings of fact and conclusions of law, to wit:

187 Title of Court and Cause.

In this action a trial by jury having been heretofore waived by oral consent of parties, by their attorneys, in open court, entered upon the minutes, the action is tried by the court, and the court, having heard the evidence and argument of counsel and having considered the case and being fully advised in the premises, finds the following facts and conclusions of law, to wit:

Findings of Fact.

I.

In the latter part of December, 1889, Andrew J. Davis, now deceased, was and had been for some months seriously and dangerously ill and suffering from the disease and ailment from which he afterwards died.

II.

That on or about the 27th or 28th day of December, 1889, at Butte city, in the county of Silver Bow and State of Montana, the

said Andrew J. Davis, now deceased, being then seriously and dangerously ill and suffering from the disease and ailment of
188 which he afterwards died, and in view and in apprehension and expectation of his death from said disease and ailment, gave to Andrew J. Davis, one of the defendants herein, as a gift, the shares of stock and certificates thereof of The First National Bank of Butte, one of the defendants herein, which are described in the complaint, and at the same time delivered said certificates of stock to the said Andrew J. Davis, one of the defendants herein, as a gift. The said defendant, Andrew J. Davis, then and there received and accepted the same.

III.

That thereafter, on the 11th day of March, 1890, at Butte city, Montana, the sa*di* Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of the said stock and certificates thereof to Andrew J. Davis, one of the defendants herein and as above found.

IV.

That said Andrew J. Davis, one of the defendants herein, has ever since said gift and delivery above found retained and held in his possession and claimed as his own, and does now so hold in his possession and claim as his own, all of the said shar-s of stock
189 and the certificates thereof described in the complaint.

V.

That at the time of the gift and delivery of the said shares of stock and certificates thereof by the said Andrew J. Davis, now deceased, to the said Andrew J. Davis, one of the defendants herein, as above found, the said Andrew J. Davis, now deceased, was of sound and disposing mind.

VI.

That at and long prior to the time of the gift and delivery of the said stock and certificates thereof, as above found, the said Andrew J. Davis, now deceased, had and expressed a great affection for and a great confidence in the business capacity and character of the said Andrew J. Davis, one of the defendants herein.

VII.

That at the time of the gift of the stock and certificates thereof, as above found, it was and for several years prior thereto had been the intention of the said Andrew J. Davis, now deceased, to give the said stock and the certificates thereof of the said First National Bank of Butte to the said Andrew J. Davis, one of the defendants herein.

VIII.

190 The court further finds as facts:
That there was no written assignment of said stock or cer

tificates of stock or power of attorney executed by the donor in connection with the gift; that there was no written authority executed by the donor of any kind empowering the defendant Andrew J. Davis or any other person for him to transfer said stocks or certificates of stock upon the books of the bank during the lifetime of the donor, and that there was no transfer of the stock or the certificates thereof to the defendant Andrew J. Davis upon the books of the bank during the lifetime of the donor or ever or at all.

That at a meeting of the stockholders of the said bank held some time after the said gift had been made, and before the death of the donor, John E. Davis, a brother of the defendant Andrew J. Davis was given a proxy in writing by said defendant, which had been signed by the donor, before the date when the gift was made and delivered to defendant Andrew J. Davis before said gift was made; that said John E. Davis, under and by the directions and according to the reque. of said defendant, Andrew J. Davis, voted said proxy at said stockholders' meeting; that said John E. Davis had no conversation with the said donor regarding said
191 proxy, and after having voted the same returned it to the defendant Andrew J. Davis, who has ever since retained it.

That the donor was seriously and dangerously ill from a time prior to the date when he made the gift until his death, and did not revoke said gift or exercise any control over said stock or the certificates thereof, nor act as stockholder of said bank.

That the donor was elected president of said bank after he had made said gift and he continued in that position until his death, but said election was without his knowledge or request, and he had no knowledge of said election of himself as president, or of his holding said position, and never did any act as president of the said bank from the time he made the gift.

That there was no gift made or attempted to be made by the donor to the defendant Andrew J. Davis other than the gift made about the 27th or 28th of December, 1889, as heretofore found in findings II.

That at the time the donor made the gift he was seriously and dangerously ill, suffering from the ailment and sickness of which he afterwards died, and was contemplating a trip or journey at the time.

That the gift by the donor to the defendant Andrew J.
192 Davis was an absolute gift and was and is a valid gift, *mortis causa*, and the donee has ever since held possession and exercised control and dominion over said stock with the knowledge of the donor arising and resulting only from the fact of the gift and the donee's possession.

193 *Conclusions of Law.*

I.

That the defendant Andrew J. Davis is the owner of the stock and shares and certificates thereof of the First National Bank of Butte, which are described in the complaint herein, and is entitled

to have said shares and stock transferred to him on the books of said bank, and to have new certificates issued to him therefore, and that said donor was divested of his possession, dominion, and control of said shares of stock by said gift.

II.

That the plaintiff herein, as special administrator of the estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate, any right, title, or claim in or to the shares of stock and the certificates thereof described in the complaint or any part thereof.

III.

That the defendant Andrew J. Davis is entitled to a decree herein in accordance with the prayer of this answer, and such decree is hereby ordered entered.

JOHN J. McHATTON, *Judge.*

Filed May —, 1894.

194 To which said findings, separately and severally and as a whole, plaintiff then and there, at the time and in open court, duly excepted.

And on the day last aforesaid, upon motion of defendant, Andrew J. Davis, the court rendered and passed the following decree:

195 Title of Court and Cause.

In this action a trial by jury having been heretofore waived by oral consent of parties, by their attorneys, in open court, entered upon the minutes, the action was tried by the court; and the court having heard the evidence and argument of counsel, having heretofore taken the case under advisement, and being now fully advised in the premises and all things being duly considered—

Now, on this 25th day of May, A. D. 1894, in open court, the court makes its findings of fact and conclusions of law in the case, which are herein signed and filed and which are in the words and figures following, to wit:

Findings of Fact.

I.

"That in the latter part of December, 1889, Andrew J. Davis, now deceased, was and had been for some months seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died."

II.

196 "That on or about the 27th or 28th of December, 1889, at Butte city, in the county of Silver Bow and State of Montana, the said Andrew J. Davis, now deceased, being then seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died, and in view and in apprehension and expecta-

tion of his death from said disease and ailment, gave to Andrew J. Davis, one of the defendants herein, as a gift, the shares and stock and certificates thereof of The First National Bank of Butte, one of the defendants herein, which are described in the complaint, and at the same time delivered said certificates of stock to the said Andrew J. Davis, one of the defendants herein, as a gift. The said defendant, Andrew J. Davis, then and there received and accepted the same."

III.

"That thereafter, on the 11th day of March, 1890, at Butte city, Montana, the said Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of the said stock and certificates thereof to Andrew J. Davis, one of the defendants herein, as above found."

IV.

"That the said Andrew J. Davis, one of the defendants
197 herein, has ever since said gift and delivery above found retained and held in his possession and claimed as his own and does now so hold in his possession and claim as his own all of the said shares of stock and the certificates thereof described in the complaint."

V.

"That at the time of the gift and delivery of said shares and certificates thereof by the said Andrew J. Davis, now deceased, to the said Andrew J. Davis, one of the defendants herein, as above found, the said Andrew J. Davis, now deceased, was of sound and disposing mind."

VI.

"That at and long prior to the time of the gift and delivery of the said stock and certificates thereof, as above found, the said Andrew J. Davis, now deceased, had and expressed a great affection for and a great confidence in the business capacity and character of the said Andrew J. Davis, one of the defendants herein."

VII.

"That at the time of the gift of the stock and certificates thereof, as above found, it was and for several years prior thereto had been the intention of the said Andrew J. Davis, now deceased, to give the said stock and the certificates thereof of the First National
198 Bank of Butte to the said Andrew J. Davis, one of the defendants herein."

VIII.

"That there was no written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the gift; that there was no written authority executed by the donor of any kind empowering the defendant Andrew J. Davis or *to*

any other person for him to transfer said stock or certificates of stock upon the books of the bank during the lifetime of the donor, and that there was no transfer of the stock or the certificates thereof to the defendant Andrew J. Davis upon the books of the bank during the lifetime of the donor or ever or at all.

"That at a meeting of the stockholders of the said bank, held some time after said gift had been made and before the death of the donor, John E. Davis, a brother of the defendant, Andrew J. Davis, was given a proxy in writing by said defendant, which had been signed by the donor, before the date when the gift was made and delivered to said defendant, Andrew J. Davis, before said gift was made; that said John E. Davis, under and by the directions and according to the request of said defendant, Andrew J. Davis, voted said proxy at said stockholders' meeting; that said John E. Davis had no conversation with the said donor regarding
199 said proxy, and after having voted the same returned it to the defendant Andrew J. Davis, who has ever since retained it.

"That the donor was seriously and dangerously ill from a time prior to the date when he made the gift until his death, and did not revoke said gift nor exercise any control over said stock or the certificates thereof, nor act as a stockholder of said bank; that the said donor was elected president of said bank after he had made said gift, and he continued in that position until his death, but said election was without his knowledge or request and he had no knowledge of said election of himself as president or of his holding said position and never did any act as president of said bank from the time he made the gift.

"That there was no gift made or attempted to be made by the donor to the defendant Andrew J. Davis other than the gift made about the 27th or 28th day of December, 1889, as heretofore found in finding II.

"That at the time the donor made said gift he was seriously and dangerously ill, suffering from the ailment and sickness of which he afterwards died and was contemplating making a trip or journey at the time.

"That the gift by the donor to the defendant Andrew J. Davis was an absolute gift and was and is a valid gift *mortis causa*,
200 and the donee has ever since held possession and exercised control and dominion over said stock, with the knowledge of the donor, arising and resulting only from the fact of the gift and the donee's possession."

Conclusions of Law.

I.

"That the defendant Andrew J. Davis is the owner of the stock and shares and certificates thereof of the said First National Bank of Butte, which are described in the complaint herein, and is entitled to have said shares and stock transferred to him on the books

of said bank, and to have new certificates issued to him therefor, and that said donor was divested of his possession, dominion, and control of said shares of stock by said gift."

II.

"That the plaintiff herein, as special administrator of the estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim in or to the shares of stock and the certificates thereof described in the complaint or any part thereof."

III.

"That the defendant Andrew J. Davis is entitled to a decree herein in accordance with the prayer of his answer, and such decree is hereby ordered entered."

201 And thereupon it is by the court ordered, adjudged, and decreed, in open court, on this 25th day of May, A. D. 1894, that plaintiff take nothing by his complaint herein; that defendant Andrew J. Davis is the owner of each and all of the shares of said stock and of the certificates thereof of the said First National Bank of Butte, which are described in the complaint herein as follows, to wit:

Nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of the defendant's herein, consisting of and represented by certificates No. 10, for four hundred and eighty-one (481) shares; certificate No. 14, for three hundred and forty-three (343) shares; certificate No. 22, for one hundred and sixteen (116) shares, and certificate No. 25, for ten (10) shares; and said Andrew J. Davis, defendant herein, is entitled to have each and all of said shares transferred to him on the books of said bank; that plaintiff, as special administrator of said estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim to said shares of stock or the certificates thereof or any part thereof; that The First National Bank of Butte, one of the defendants herein, having appeared and answered

202 herein, stating that it is ready and willing to comply with any order that the court may make herein, be, and is hereby, ordered to transfer upon the books of said bank to Andrew J. Davis, one of the defendants herein, all of the shares and stock above described and mentioned in the certificates above mentioned, and to issue to said Andrew J. Davis, defendant, new and proper certificates therefor; and it is further considered and adjudged by the court that the said defendant, Andrew J. Davis, have and recover of plaintiff herein or of the estate of the said Andrew J. Davis, now deceased, his defendant's costs and disbursements herein taxed, forty-six and $\frac{40}{100}$ ($46.40) dollars.

Dated May 25th, 1894, and signed.

JOHN J. McHATTON, *Judge.*

Be it remembered that on the 23rd day of May, A. D. 1894, the plaintiff in the above-entitled action submitted to the court his sev-

eral requests for findings of facts; which several requests for findings of facts were separately and severally submitted to the court; and also certain requests upon questions of law; a portion of which said findings of facts and questions of law were not found by
203 the court, and in which respect the said plaintiff, by his attorney, in open court, then and there duly excepted to each thereof separate and severally; and the court thereupon found certain facts and conclusions of law and filed the same with the clerk; to each and every such findings of facts and conclusions of law the said plaintiff, by his attorneys, in open court, then and there duly excepted.

And the said plaintiff having also filed his motion for judgement and decree upon the evidence herein, the same, being considered by the court, was overruled, and to each ruling the plaintiff then and there, in open court, duly excepted, and his bill of exceptions was signed, sealed, and made a part of the records herein.

Filed May 25th, 1894.

To which plaintiff then and there and at the time and in open court excepted, and this his bill of exceptions is here and now, in open court, duly signed and made a part of the records herein this 25th day of May, A. D. 1894.

JOHN J. McHATTON, *Judge.*

Title of Court, Title of Cause.

And upon the rendition of said decree, upon the motion of plaintiff, it was ordered that plaintiff have thirty days from and after the filing of the notice of motion for a new trial to prepare, serve, and file his statement and affidavits for a new trial herein; which said order was made, by consent of parties, in open court on the 25th day of May, 1894.

204 Title of Court and Cause.

Now comes the plaintiff in the above-entitled cause, being the party aggrieved therein, and within ten days after notice of the findings and decisions of the court and the filing thereof gives notice of his intention to apply and move for a new trial herein and designates the following grounds therefor, viz:

I.

Newly discovered evidence material for the plaintiff making the motion and application.

II.

Insufficiency of the evidence to justify the findings and decision of the court, and that the same are against law.

III.

Errors of law occurring at the trial and excepted to by the party making the motion and application.

The said application and motion will be made upon a statement

of the case to be served and filed within thirty days from the service and filing of this notice, in accordance with the order of the court in which this action is pending and heretofore made therein,
205 and upon affidavits filed and served within the statutory time allowed therefor.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Plaintiff.

Service of the within is hereby admitted and copy received this 4th day of June, 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, AND
W. W. DIXON,
Attorneys for Defendants.

Filed June 4th, 1894.

206 Title of Court, Title of Cause.

Whereas it has been heretofore stipulated and agreed between the parties hereto that the time for preparing affidavits and statement on motion for new trial be extended thirty days from and after the filing of notice of motion for new trial; and

Whereas an order of court has been duly made extending said time accordingly, which expires on the fourth inst.; and

Whereas the defendants, the adverse parties, are willing and consent to a further extension of time for preparing, serving, and filing of said affidavits and statement on motion for new trial:

Now, therefore, it is hereby stipulated and agreed that said court or the judge thereof may make an order extending said time for the purposes aforesaid for the space of twenty days from and after the date hereof, and that the said defendants have twenty days from and after the filing and service of said affidavits and statement to file and serve counter-affidavits and amendments to said statement, the extensions aforesaid being conceded to be necessary and proper in the matter of said motion and application.

207 Dated this second day of July, A. D. 1894.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Plaintiff.

M. KIRKPATRICK,
FORBIS & FORBIS, AND
W. W. DIXON, *Attorneys for Defendants.*

For good and sufficient cause shown, the time for preparing, serving, and filing affidavits and statement on motion for new trial on the part of the plaintiff is hereby extended for twenty days, and the time for filing counter-affidavits and amendments — said statement is also extended for twenty days after the filing and service of said affidavits upon said defendants or their attorneys, all of

which is done by the consent of the parties hereto and in pursuance of the foregoing stipulation.

Given under my hand this second day of July, A. D. 1894.

JOHN J. McHATTON,
Judge of said Court.

208 And within the time allowed for that purpose, in pursuance of said stipulations and orders of court in that behalf and in accordance with his notice of motion therefor, plaintiff comes now and makes this his motion and application for a new trial, and as a part thereof specifies the particular grounds therefor as follows, to wit:

I.

Newly discovered evidence material for the plaintiff in making the motion and application, as will appear from the affidavits herein.

II.

Insufficiency of the evidence to justify the finding and decision of the court, and that the same are against law in this, to wit:

a. The evidence fails to show that there *was* any written assignments of said certificates of stock.

b. It fails to show that there was any power of attorney or instrument in writing executed in connection with the alleged gift authorizing the transfer or assignment of said stock or the transfer thereof on the books of defendant bank.

c. It does not show that the legal title to said certificates of stock was ever transferred or assigned to the alleged donee thereof.

209 *d.* It does not show that said donee ever acquired the beneficial interest in said stock.

e. It does not show that said donee ever became a stockholder in said bank.

f. It does not show that said alleged gift was ever perfected or that said alleged *said* donee was ever subjected to the liabilities or entitled to the dividends or benefits of said alleged gift by becoming a shareholder or stockholder in said bank or otherwise.

g. It does not show that said alleged gift was perfected so as to substitute said alleged donor to the rights of said alleged donee.

h. The evidence fails to show that said alleged donee acquired any legal or equitable title to said stock, or that a court of equity had jurisdiction to supply or perfect the right thus left imperfect by the alleged donor.

i. The evidence shows that said alleged donee acquired no rights as a shareholder or stockholder in said bank, and that he was not subjected to any liabilities on account thereof as provided by the acts of Congress in that behalf or by the by-laws of said bank.

210 *j.* It shows that said alleged donee retained possession, dominion, and control of the stock in said bank after the alleged gift and up to his death.

k. It shows that said alleged donee never acquired possession, dominion, or control of said stock during the lifetime of said de-

ceased, and that he could not — so under the said laws of the United States or by the by-laws of said bank, made for the protection of the public and those dealings with said bank.

l. It shows that the possession, dominion, and control of the stock of said bank designated in said certificates was held and exercised by said alleged donee during his lifetime and after said alleged gift, and that he was represented by proxy in voting and controlling the same.

m. It shows that the alleged donor acted as a stockholder or shareholder in said bank after the alleged gift during his lifetime.

n. It shows that said alleged gift was made contingent upon said alleged donor's return from his trip to Tacoma, and that he did return from said trip.

o. It shows that said gift was not a gift *in presenti*; that it was not perfected as such, but was made upon condition of the alleged donor's death.

211 *p.* It shows that the alleged gift was upon a condition precedent and was not a perfected gift subject to be defeated by conditions subsequent.

q. The evidence only shows an intention to make a gift, and that no pretended gift was made or attempted to be made except that claimed to have been made at the writing desk, at the alleged donee's residence, in the presence of plaintiff and the alleged donee and donor, on the 27th or 28th day of December, 1889, which failed to show any assignment of said stock or the certificates thereof, or any power of attorney authorizing the same, or any transfer or authority to transfer the same upon the books of the bank, and it expressly shows said alleged gift to be conditional, imperfect, and invalid, and that it was made, if made at all, according to the testimony of the only witness to said alleged gift, to depend upon an accident or something happening to him on his said trip to Tacoma or his failure to return, and that said alleged gift was on account thereof invalid.

r. Because the evidence shows without contradiction that the only gift claimed or sought to be proven was on the 27th or 28th day of December, 1889, and because the only witness testifying to said gift stated in his testimony that he was sure that in making

212 the alleged gift the donor said at the time that it was to be the donee's if anything happened to him on his said trip.

s. That all evidence as to any gift made or intended to be made must and does refer to said pretended gift on the said 27th or 28th day of December, 1889, and does not and cannot extend or enlarge the effect thereof, which was and is incomplete as a gift *causa mortis*.

t. It shows that the alleged donee was elected as an officer of said bank after said alleged gift and was a stockholder and the only one authorized to possess and control said stock under the laws of the United States.

u. Because the evidence without any conflict therein refers to the alleged gift on the 27th or 28th day of December, 1889; that it was made in contemplation of a trip from Butte, Montana, to Tacoma,

Washington, and was expressly and without consideration in these words: "If I don't come back or anything happens, I want you to have that stock," and does not constitute a gift at common law, in force in this State, and could not be such under the statutes of the United States applicable to the transfer of stock in national banks.

213 *v.* It does not show that said alleged gift was to take effect prior to the death of the alleged donor.

w. It does now show that said alleged donee exercised any possession, dominion, or control of said stock during the lifetime of the donee; that he ever received any dividends or benefits thereof or was authorized to receive any, or that under the alleged gift he was ever admitted or registered as a stockholder or a shareholder or entitled to be, or that he was ever subjected to any liabilities as a stockholder under the laws of the United States or otherwise, or that he ever voted said stock or controlled the voting thereof with the knowledge or consent of the alleged donors.

x. The by-laws in evidence show that there was no gift *causa mortis* of said stock.

y. The evidence shows only an intention to give and that no gift was perfected during the lifetime of the alleged donor, and fails to show that said alleged gift was in contemplation of death, proximate or otherwise, from any disease with which the alleged donor was then suffering, and that said alleged gift was testamentary in its character and was intended to be perfected by will thereafter to be drawn, and is therefore invalid.

z. The evidence upon which said alleged gift is based is

214 not certain, definite, and unequivocal that any such gift was made, and is therefore insufficient in law.

III.

Errors in law occurring at the trial and excepted to by the plaintiff, that party making this motion and application, in this, to wit:

The court erred:

a. In admitting evidence of the estimate of the alleged donor of the business qualifications of the alleged donee.

b. In admitting evidence of the affection of the said donor for said donee.

c. In admitting evidence of the intention of the said donee to make said gift.

d. In admitting any evidence of the alleged gift except the words and transaction used and had at the time the same is alleged to have been made and the only gift claimed or sought to be proven.

e. In admitting evidence tending to show an intention on the part of the alleged donor to give upon his death or any other condition or contingency to establish the alleged gift *causa mortis*.

215 *f.* In admitting the evidence of John E. Davis that the alleged donee directing him in casting the votes of the alleged donee as his proxy.

g. In overruling the objection of plaintiff to the interrogation calling for said evidence and in not striking out the same on his motion.

h. Overruling plaintiff's objection to the introduction in evidence of the inventory and supplemental inventory of the estate of the said alleged donor, and in admitting the same.

i. In not finding upon all of the special findings requested by plaintiff.

j. In not finding in each or any separately and severally of the special findings so requested.

k. By making the findings it did make in said cause.

l. In overruling plaintiff's motion for judgment and in rendering a decree for defendant Davis.

m. In directing a transfer of the said stock upon the books of the bank.

n. In directing the perfection by which the decree itself appears to be imperfected.

o. In trans-ending the powers of the court in making and perfecting a gift for the stock in question from the alleged donor to the alleged donee.

216 *p.* In that said decree is in violation of the laws of the United States and by-laws of the bank.

q. In that it divests the estate of a legal and beneficial title to said stock without any consideration therefor and upon a pretended gift *causa mortis*, which could only have been done and perfected by the donor.

r. The court has no jurisdiction by said decree under the laws of the United States to make said defendant, Davis, a shareholder in said bank.

s. No discretion under said laws is vested in said court to substitute said alleged *said* donee for said alleged donor or relieve said donor or his estate of the liability as such stockholder and substitute said alleged donee therefor.

t. The court erred in not entertaining or passing upon the Federal question involved, and in not pursuing the rules of the common law adopted by statute in this State requiring the assignment of said stock to be in.

u. The court erred in other matters in the particular specified in the foregoing statement and hereby incorporated in this specification of errors and hereby expressly referred to.

217 Service of the copy of the foregoing statement of motion for new trial this day received and accepted, in pursuance of a stipulation and order heretofore made and entered in said cause. Dated July 19th, 1894.

M. KIRKPATRICK,
FORBIS & FORBIS,
W. W. DIXON,
Attorneys for Defendants.

We, the undersigned attorneys for the plaintiff and defendant- in the above-entitled cause, hereby agree to the foregoing statement on

motion for a new trial as amended to be correct and accept and receive the same accordingly.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Plaintiff.

M. KIRKPATRICK,
W. W. DIXON,
FORBIS & FORBIS,
Attorneys for Defendant.

I hereby certify that the foregoing statement and record has been settled, and that the same is allowed, and I authorize and direct the filing thereof by the clerk of this court.

JOHN J. McHATTON, *Judge.*

August 11th, 1894.

218 Title of Court and Cause.

STATE OF MONTANA, } ss:
County of Silver Bow, }

James R. Boyce, Junior, being first duly sworn, on his oath does say that he is fifty years of age and a resident of Butte city, Silver Bow county, and State of Montana, and that he has resided there for fourteen (14) years last past; that he is well acquainted with one W. C. Darnold, who was a witness in above-entitled action, on the trial thereof in May last, on the part of the defendant therein; that he had a conversation with W. C. Darnold about the 1st day of July, A. D. 1894; he, Darnold, had been absent from Butte city about three (3) weeks and returned on or about the 1st day of July, A. D. 1894, from a trip east; he, Darnold, said he had been to Piqua, Ohio, visiting his old home; he said he had a choice of going to California or going to Piqua, and that he had preferred to go to Piqua, which choice was given to him by Mr. Meyer Gansburger; that he said he could go where he pleased, he had his choice; he said he had been chaperoned over the country by Meyer Gansberger, and that he was glad to get back; he said he had demanded a return ticket before he left in order that he could get back here in the event that his testimony might be necessary in cases now pending in court with eastern creditors and J. R. Boyce, Jr., and Company; that he
219 had demanded this return ticket and got it; he said that he testified on behalf of Andy Davis on the trial of the above cause, inasmuch as he believed it would be to his interest to do so from a pecuniary standpoint, and that it would not hurt me in my cases that would follow, as my action would be against the bank, and that he desired to strengthen the bank as much as possible, but that his testimony on the trial of the case was not true; that his conversation with Judge Davis was in August, 1886, wherein Andy had discharged him in August, 1886, and that he had gone to Judge Davis and reported to him that Andy had discharged him for open-

ing a ledger at the end of the month, instead of opening it at the first of the month, as Andy wished him to, for transferring accounts from one ledger to the other, and that the Judge had told him to go back to Andy and apologize, for some day he might be the owner of the bank, and that this conversation occurred in August, 1886, instead of February, 1890 He stated that he never had a conversation with Judge Davis after that time on the subject of Andy becoming the owner of the bank, and that this conversation of February, 1890, which was given in his testimony in behalf of the supposed gift by Judge Davis, which he had testified to on the trial, was not true.

On July 6th Darnold came to me and asked me to accom-
220 pany him to the residence of John H. Curtis; that he has heard read the affidavit of John H. Curtis made the day in the above cause wit- reference to said conversation, and that the statement of said Curtis as to said conversation is correct and in accordance with my memory of the same.

On the 11th day of July, A. D. 1894, Darnold asked me to go with him to see Mr. Stapleton; that he wanted to correct the testimony he had given upon the trial of this case. We went to Mr. Stapleton's room in the Butte hotel, where said Darnold made the following statement in substance in the presence of Mr. Stapleton:

He, Darnold, there stated that his former statements on the trial were not true and that he wanted to correct them; that he did not feel right over it; that his conscience had troubled him and that he wanted to correct the statement. He then stated that the only conversation he ever had with Judge Davis concerning Andy owning the bank was in August, 1886.

Affiant further says that on the day of the funeral of Judge Davis Andrew J. Davis, Junior, had a conversation with him with reference to the bank stock and wanted to know what I knew about it. Shortly after this I met Mr. Talbott on the corner of Jackson and Galena streets, in front of his residence, and had a conversation with him in reference to Andrew and the bank stock, in which he stated in substance that Judge Davis had given Andy the
221 stock upon condition that he did not return from Tacoma on the sound, and that he did not believe he could legally hold it for the reason that it was made upon condition that he, Judge Davis, did not return, and that Judge Davis did return, and for this reason he did not believe that Andy could hold it.

Affiant further says that he has given the dates of the conversation above referred to as near as he can, and, while he may not be correct as to dates, he is certain as — the facts detailed in this affidavit.

Affiant further says that he had, during the progress of the trial of this case, some controversy pending between James R. Boyce, Junior, and Company and the bank, and that he was trying to make a compromise of it, and that he did not detail to the attorneys the facts hereinbefore last stated for the reason that he was fearful that it might interfere with the compromise and of what he thought would result in a settlement of it, and that he has not communicated

the same to the attorneys or to the plaintiff in the case until since the termination of the trial of the above-entitled cause.

And further affiant saith not.

JAMES R. BOYCE, JR.

Subscribed and sworn to before me this — day of July, A. D. 1894.

FRANK E. CORBETT,
Notary Public in and for the County of Silver Bow and State of Montana.

222 Due and sufficient service of the foregoing affidavit acknowledged by copy this 21st day of July, A. D. 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, AND
W. W. DIXON,
Att-rneys for Defendants.

Filed July 21st, 1894.

Title of Court, Title of Cause.

STATE OF MONTANA, }
County of Silver Bow, } ss:

John H. Curtis, being first duly sworn, on his oath doth say that he is fifty-four years of age; that he is a resident of the city of Butte, county of Silver Bow and State of Montana, and that he has been a resident of Silver Bow county about fourteen (14) years and has been a resident of the State of Montana for about twenty-eight (28) years.

That he heard a conversation between James R. Boyce, Junior, and W. C. Darnold, who was a witness in the case aforesaid on the trial thereof in the above-entitled court in the month of May, A. D. 1894, at my residence, in the city of Butte, county of Silver Bow and State of Montana, about the 10th day of July, A. D. 1894; that I heard Darnold make a statement in said conversation to Mr. Boyce which was in substance as follows, to wit: That he, Darnold, had made a demand upon Mr. Davis to give him ten thousand
223 dollars ($10,000.00), which would enable him to go into business in his own town in Ohio, and that if they did not give it he intended to go — the attorneys and tell them that he misrepresented his statements on the witness stand. Mr. Boyce remarked, Darnold, you know that I warned you before the trial to confine yourself to the truth in this case, and Darnold remarked, Well, Mr. Boyce, I am trying to do the best I can for myself, and in doing that I want to aid you in getting your claim; and he, Darnold, turned around and asked me if that was not right. I answered him no; that Boyce's is a legitimate claim, which he can contest for in his own rights in a legal way, and your claim is an illegitimate claim, and the penitentiary would be your doom if it was found out that you lied in this testimony. That I have not communicated this

conversation to the plaintiff or his counsel or to anybody until now. I kept this to myself.

And affiant further saith not.

JOHN H. CURTIS.

Subscribed and sworn to before me this 21st day of July, A. D. 1894.

FRANK E. CORBETT,
[SEAL.] *Notary Public in and for the County of Silver Bow and State of Montana.*

Due and sufficient service of the foregoing affidavit acknowledged by copy this 21st day of July, 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, AND
224 W. W. DIXON,
Attorneys for Defendants.

Filed July 21st, 1894.

Title of Court and Cause.

STATE OF MINNESOTA, } ss:
County of Douglas, }

John B. Wellcome came personally before me and, being first duly sworn, on his oath doth say: I am acquainted with W. C. Darnold, a witness who t-stified in behalf of the defendant- in the above-entitled action. Some time before the above-entitled action was commenced I had a conversation with the said Darnold at my office, in Butte, Montana, which conversation was had in the presence of James R. Boyce, Jr., and which conversation related to the knowledge possessed by W. C. Darnold of facts connected with the transfer of the stock of the First National Bank of Butte from Andrew J. Davis, deceased, to Andrew J. Davis, Jr. We were talking about a suit which Mr. Boyce proposed to bring against the First National bank, when Mr. Darnold said that he considered it strange that he had not been called upon to testify in the Davis will case. As I, the affiant, am one of the attorneys for the contestant in the Davis will case, I inquired of Mr. Darnold as to what he would testify to should he be called upon. Mr. Darnold then explained that
225 he knew nothing in regard to the will, but that his testimony would be valuable to Andrew J. Davis, Jr., in securing to Andrew J. Davis, Jr., the stock of the First National bank. I then asked Mr. Darnold what he knew respecting the matter, and he said at one time he was employed in the First National bank as bookkeeper; that this was some time prior to the death of Andrew J. Davis, Sr.: that Andrew J. Davis, Jr., was employed in the bank at the same time; that he, Darnold, had had some difficulty or disagreement with Andrew J. Davis, Jr., and that thereupon he went to Andrew J. Davis, *Jr.*, and told him that he did not wish to continue longer in the employ of the bank, as he could not get along with Andrew J. Davis, Jr; that Andrew J. Davis, Sr., then said,

"Mr. Darnold, you should not take exception to anything Andy says or does, as he will some time own this bank. In fact, he does own it now." I then asked Mr. Darnold when this conversation occurred. He said he could not give the exact date of it, but it was some time before the death of Andrew J. Davis, Sr., and some time before Andrew J. Davis, Sr., started for the Pacific coast. I then asked Mr. Darnold if he had any conversation with Andrew J. Davis, Sr., in regard to Andy and the bank stock after the return of Andrew J. Davis, Sr., from the coast, and he replied that he had not. He said he left the bank immediately after having the conversation with Andrew J. Davis, Sr., as hereinbefore set
226 forth, and that after that time he had no conversation whatever with Mr. Davis, the deceased. I then told Mr. Darnold that I did not think his testimony was material to either side, and he said he thought it might be used by Andy in establishing the fact that Andrew J. Davis, Sr., intended to give him (Andy) the bank. I could see from Mr. Darnold's manner and conversation that he thought that I (the affiant) was one of the attorneys for Andrew J. Davis, Jr. I then told him I was retained for the contestant in the will case, and that my interest and the interests of my client were opposed to Andrew J. Davis, Jr. He then said that he thought I was the attorney for Andrew. Darnold made no mention whatever at that or any other time of any conversation had with Andrew J. Davis, Sr., after the return of the latter from the Pacific coast. In answer to the question as to whether any such conversation occurred he expressly stated that none had occurred, and that the conversation as given above was the only conversation he ever had with Andrew J. Davis, Sr., touching the question of Andrew's interest in the bank. As one of the attorneys for the Root interest in this controversy, I was particular in examining and questioning Mr. Darnold carefully as to what he knew touching the claim of Andrew J. Davis, Jr., to the stock of the First National bank.

JOHN B. WELLCOME.

227 Subscribed and sworn to before me this 19th day of July, A. D. 1894.

GEO. L. TREAT,
Notary Public, Minnesota.

[NOTARIAL SEAL.]

Filed July 24th, 1894.

Title of Court and Cause.

Defendant Andrew J. Davis moves the court to strike from the files and not to consider upon plaintiff's motion for a new trial herein the affidavit of John B. Wellcome, herein purporting to be filed on the twenty-fourth day of July, A. D. 1894, for the reason that said affidavit was not filed or served within the time required by law or by the stipulation of the parties and the order of the court herein made on the second day of July, A. D. 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, AND
W. W. DIXON,
Attorneys for Defendants.

The plaintiff and his attorneys in the above-entitled action are hereby notified that defendant will bring on the above motion for hearing before the above-entitled court or the judge thereof upon the settlement of the statement on motion for new trial herein, or upon the hearing of said motion for new trial, as said court
228 or judge may direct.

M. KIRKPATRICK,
FORBIS & FORBIS, AND
W. W. DIXON,
Attorneys for Defendant.

Service of foregoing motion and notice by copy acknowledged this 31st day of July, A. D. 1894.

Rec'd copy foregoing this 31st day July, 1894.

McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed Aug.ist 1st, 1894.

Title of Court and Cause.

STATE OF MONTANA, }
County of Silver Bow, } ss:

William I. Lippincott, of lawful age, being first duly sworn, on oath says: I reside in Butte, in said county and State, and have lived here for more than ten years last past. I know James R. Boyce, Junior, and have known him for several years. He has talked to me several times about his troubles with the First National Bank of Butte. He claimed that Judge Davis was a partner with him in business, and that if he (Judge Davis) had had the management of the matter there would have been no suit brought by the bank. He said that Andy (meaning Andrew J. Davis, a defendant in this action) was the sole instigator of the suit, and was the
229 cause of having his (said Boyce's) store closed up.

WILLIAM I. LIPPINCOTT.

Subscribed and sworn to before me this 28th day of July, A. D. 1894.

D'GAY STIVERS,
[NOTARIAL SEAL.] *Notary Public.*

Rec'd copy foregoing affidavit this 31st day of July, A. D. 1894.

McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed August 1st, 1894.

Title of Court and Cause.

STATE OF MONTANA, }
County of Silver Bow, } ss:

Andrew J. Davis, of lawful age, being first duly sworn, on oath says: I am a resident of Butte city, Silver Bow county, Montana,

and cashier of the First National Bank of Butte, and am one of the defendants in the above-entitled action.

I have read the affidavits of James R. Boyce, Junior, and John H. Curtis, herein filed on the part of plaintiff, on his motion for a new trial in this action. I do not know nor have I any reliable information as to what statements, if any, the witness W. C.
230 Darnold may have made after the trial of this cause, with reference to the testimony which he gave on said trial, but I do know that the matters and things stated by said Darnold in his testimony on said trial were in every respect the same that he stated before said trial to myself and my counsel in this case that he would testify to. I never gave or promised or offered to give to said Darnold any money or other valuable thing for his testimony in this action, or to influence the same in any way or to induce or influence him to make or withhold any statements about the matter, either before or after the trial.

I know James R. Boyce, Junior, who made the affidavit herein filed. In 1891, on behalf of the First National Bank of Butte, to which said bank said Boyce was largely indebted at that time, to secure said indebtedness I caused the stock of merchandise of said James R. Boyce, Junior, to be attached and sold under execution, and ever since said time said Boyce has been hostile and unfriendly towards me, claiming that I had been instrumental in breaking him up in business, and, as I am informed and believed, has frequently expressed his enmity towards me and stated that he would ruin me if he could. At the time the stock of merchandise of said Boyce was attached at the suit of the First National Bank of Butte, as above stated, said Boyce was also largely indebted to other creditors of his, who have been unable to collect their
231 demands, and the same to the amount of many thousand dollars are now outstanding and unpaid. Since the trial of this action said Boyce has proposed to me to buy up the claims of these unpaid creditors, which, he said, could be purchased at a heavy discount, and that he and I would go in together and prove that Andrew J. Davis, now deceased, was a partner in business with said Boyce, and collect the full amount of said debts from the estate of said Andrew J. Davis. I did not consent to this arrangement and gave said Boyce no satisfaction in regard to his scheme. On Friday, the twentieth day of July, 1894, about three o'clock in the afternoon, said Boyce came into the First National Bank of Butte, where I was, and said to me that he (Boyce) had evidence in his (said Boyce's) pocket that would upset my case (referring to this action); that the other side wanted said evidence, but he would not let them have it if I would agree to go in with him to buy up the claims of the creditors of James R. Boyce, Junior (above mentioned), and Company and then hold the Davis estate for them. He said he would give me until noon the next day to decide what I would do; that he must know by the next day. He gave me to understand that if I did not go into the arrangement he proposed he would use the evidence which he claimed to have against me. I was busy at the

time and said but little to him. The next morning, about
232 ten o'clock, he came to the bank again. I then told him I would have nothing to do with the arrangement he had proposed and would not go into it, and his affidavit herein was made and filed the same day, as appears by the record.

John H. Curtis, whose affidavit on the part of plaintiff is also filed herein, is, as I am informed and believe, a brother-in-law of said James R. Boyce, Junior, and claims to be a creditor of said Boyce to a large amount.

ANDREW J. DAVIS.

Subscribed and sworn to before me this 30th day of July, A. D. 1894.

D'GAY STIVERS,
[NOTARIAL SEAL.] *Notary Public.*

Service of the foregoing affidavit by copy acknowledged this 31st day of July, A. D. 1894.

——— ———,
Attorneys for Plaintiff.

Rec'd copy foregoing July 31st, 1894.
McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed August 1st, 1894.

233 Title of Court and Cause.

STATE OF MONTANA, }
County of Silver Bow, } *ss.:*

Guy X. Piatt, of lawful age, being first duly sworn, on oath says: I reside in Butte, in said county and State. I am acquainted with James R. Boyce, Junior, and have been for some time. About the fifth day of May, 1894, said Boyce talked to me about his troubles with the First National Bank of Butte and also about this bank-stock case. He spoke bitterly about the action of the bank in breaking him up in business and seemed to have a strong feeling against Andrew J. Davis, one of the defendants in this action. Said Boyce told me that he had in his possession important evidence against Andy (meaning Andrew J. Davis, one of the defendants in this action), in the bank-stock case, and that he intended to use it to bring about a compromise of his (said Boyce's) contest with the First National bank, and that he expected to get a large amount of money out of it. I asked said Boyce about this evidence. Boyce said he had not. I suggested to him that I might tell Andy about it, and he (Boyce) told me to do so, and several times afterwards asked me if I had done so, and seemed anxious to have it done.

Some days afterwards I told Andy about what Boyce had
234 said, but nothing was done about the matter by Andy, so far as I know.

GUY X. PIATT.

Subscribed and sworn to before me this 28th day of July, A. D. 1894.

D'GAY STIVERS,
Notary Public.

[NOTARIAL SEAL.]

Rec'd copy foregoing affidavit this 31st day of July, A. D. 1894.

McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed August 1st, 1894..

Title of Court and Cause.

STATE OF MONTANA, } ss:
County of Silver Bow, }

James A. Talbott, of lawful age, being first duly sworn, on oath says:

I reside in Butte city, in said county and State, and am the special administrator of the estate of Andrew J. Davis, deceased, and as such the plaintiff in the above-entitled action.

I have read the affidavit of James R. Boyce, Junior, herein filed on the part of plaintiff on his motion for a new trial in this action, and particularly that portion of said affidavit which relates
235 to an alleged conversation between myself and said Boyce in reference to Andrew J. Davis and the bank stock in controversy in this suit. I never had, at any time or place, any such conversation with said Boyce as is stated in his said affidavit, nor did I ever state to him, in substance or at all, that Judge Davis had given Andy the stock upon condition that he (Judge Davis) did not return from Tacoma, on the sound, or that I did not believe he (Andy) could legally hold it, for the reason that it was made upon condition that he (Judge Davis) did not return, and that Judge Davis did return, or that for that or any other reason I did not believe that Andy could hold it. Whenever I have had occasion to talk to any one about this matter of Andy's claim to the bank stock I have always stated that I did not know whether the gift of the stock to him was a valid gift or not; that that was a question for the courts to decide.

I have no interest in this action further than to perform my duties as special administrator of the estate of said Andrew J. Davis, deceased.

JAMES A. TALBOTT.

Subscribed and sworn to before me this 28th day of July, A. D. 1894.

D'GAY STIVERS,
Notary Public.

[NOTARIAL SEAL.]

236 Service of foregoing affidavit by copy acknowledged this 31st day of July, A. D. 1894.

McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed August 1st, 1894.

Title of Court and Cause.

Order.

The foregoing motion having been this day submitted upon the statement aforesaid and affidavits and counter-affidavits on file herein, and the court finding no error therein, overruled the said motion; to which the plaintiff then and there excepted this the 6th day of October, A. D. 1894.

Title of Court and Cause.

Bill of Exceptions.

Be it remembered that on the second day of July, 1894, the parties in the above-entitled action entered into the following stipulation for an extension of time to file statement on motion for a new trial herein, which is in words and figures as follows, to wit:
(See pages 206–207 of this Record.)

And on the day aforesaid the judge of said court made the following order on account of said stipulation and the statute in such case made and provided, to wit:
(See page 207 of this Record.)

237 And on the 24th day of July, 1894, said plaintiff filed the affidavit of John B. Wellcome herein, which is in words and figures as follows, to wit:
(See pages 224, 225, 226, and 227 of this Record.)

And thereafter defendants filed their motion, notice of motion, and acceptance of service of copies thereof to strike said affidavit from the files herein; which motion, notice, and service *is* in words and figures as follows, to wit:
(See pages 227 and 228 of this Record.)

And on the papers aforesaid the said motion, having been duly submitted and considered by the court, was this sixth day of October, A. D. 1894, sustained; and to which ruling of the court said plaintiff then and there and at the time, in open court, excepted, and this his bill of exceptions is at once signed, sealed, and made a part of the record in the said cause.

And the said motion having been so disposed of, and the statement on motion for new trial having been duly settled and certified to said motion upon said statement and affidavits on file herein, was duly submitted, and, after being considered by the court, no sufficient error or cause appearing in said record, the same was overruled; and to which ruling of the court said plaintiff then and there and at the time duly excepted, and this his bill of exceptions
238 is here and now and at the time, in open court, signed, sealed, and made a part of the record herein this 10th day of October, A. D. 1894.

JOHN J. McHATTON,
Judge of said Court.

Service of the within is hereby admitted and copy received this 10 day of October, 1894.

W. W. DIXON,
FORBIS & FORBIS,
M. KIRKPATRICK,
Attorneys for Def't.

Filed October 10th, 1894.

And thereafter plaintiff filed his notice of appeal herein; which notice is in the words and figures following, to wit:

Title of Court and Cause.

Notice of Appeal.

To the clerk of the district court of the second judicial district of the State of Montana in and for the county of Silver Bow, and M. Kirkpatrick, Forbis & Forbis, and W. W. Dixon, attorneys for the defendants:

Please take notice that James A. Talbott, as special administrator of the estate of Andrew J. Davis, deceased, the plaintiff in the above-entitled action, hereby appeals to the supreme court of the State of Montana from the judgment made and entered in said action
239 in the said district court of the second judicial district of the State of Montana in and for the county of Silver Bow, on the 25th day of May, A. D. 1894, in favor of the defendants and against said plaintiff, and from the whole thereof.

And also from an order made and entered in said action on the 6th day of October, A. D. 1894, overruling and denying said plaintiff's motion and application for a new trial therein, and from the whole thereof.

This appeal is taken upon questions of both law and fact.

Dated the 28th day of November, A. D. 1894.

McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
W. F. SANDERS,
Attorneys for Plaintiff.

Service of copy of the foregoing notice of appeal is hereby acknowledged and accepted this 28th day of November, 1894.

M. KIRKPATRICK,
W. W. DIXON,
FORBIS & FORBIS,
Attorneys for Defendants.

Filed November 28th, 1894.

240 Title of Court and Cause.

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

O. W. McConnell, being first duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of

eighteen years, and not a party to the above-entitled action; that he received the notice of appeal in the above-entitled case on the 28th day of November, A. D. 1894, and personally served the same on the 28th day of November, A. D. 1894, upon M. Kirkpatrick, W. W. Dixon, and Forbis & Forbis, being the attorneys to whom said notice of appeal is directed, by delivering to said attorneys personally in the city of Butte, county of Silver Bow, State of Montana, a copy of said notice of appeal and by exhibiting to said attorneys the original notice of appeal.

O. W. McCONNELL.

Subscribed and sworn to before me this the 3rd day of December, A. D. 1894.

[NOTARIAL SEAL.] M. S. GUNN,
Notary Public in and for said County of Lewis & Clarke.

Filed December 5th, 1894.

241 And thereafter plaintiff filed his undertaking on appeal herein; which undertaking is in the words and figures following, to wit:

Title of Court and Cause.

Whereas the court on the 25th day of May, 1894, rendered judgment herein in favor of the said defendants and against the said plaintiff; and

Whereas on the 6th day of October, A. D. 1894, the said court also overruled the said plaintiff's motion for a new trial herein; and

Whereas the said plaintiff is desirous of appealing the said cause to the supreme court of the said State, and has served his notice of appeal in accordance with the statute in such case made and provided:

Now, therefore, we, the undersigned, resident freeholders of the said county of Silver Bow and State of Montana, on the part of the appellant, the said plaintiff, undertake and promise to the effect that the said appellant, the said plaintiff, will pay all damages and costs which may be awarded against him, the said plaintiff, on the appeal or on a dismissal thereof not exceeding the sum of three hundred dollars.

Witness our hands and seals this 28th day of November, 1894.

JOHN G. HOLLAND. [SEAL.]
A. T. COLLINS. [SEAL.]
JAMES A. TALBOTT. [SEAL.]

242 STATE OF MONTANA, }
County of Silver Bow, } ss:

Jno. G. Holland and A. T. Collins, being severally duly sworn, each for himself says that he is a resident freeholder in the county of Silver Bow and State of Montana, and is worth the amount specified in the foregoing undertaking as the penalty thereof, over and

above his just debts and liabilities and property exempt by law from execution.

JOHN G. HOLLAND.
A. T. COLLINS.

Subscribed and sworn to before me this 28th day of November, A. D. 1894.

FRED M. FERRELL,
Notary Public.

[NOTARIAL SEAL.]

Filed November 28th, 1894.

243 STATE OF MONTANA, } ss:
County of Silver Bow, }

I, H. A. Niedenhofen, clerk of the district court of the second judicial district of the State of Montana within and for the county of Silver Bow, do hereby certify that the foregoing is a full, true, and correct copy and transcript of all the papers of which the same purports to be a copy, as appears from the files and records in my office in the case of James A. Talbott, as special administrator of the estate of Andrew J. Davis, *vs.* Andrew J. Davis, Jr., and The First National Bank of Butte.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 22d day of January, 1895.

[SEAL.] H. A. NIEDENHOFEN.

244 LEYSON }
v.
DAVIS *et al.* }

(Supreme Court of Montana, Nov. 25, 1895.)

Statement of the Case by the Justice Delivering the Opinion.

The appellant, as special administrator of the estate of Andrew J. Davis, deceased, sued to recover 950 shares of the capital stock of defendant bank alleged by him to belong to the estate of said deceased and claimed by said defendant, Andrew J. Davis, Jr., under a *donatio causa mortis*. The material allegations of the complaint are: Appellant was and is the duly qualified and acting administrator of said estate; that the defendant was and is a national bank duly organized and existing under the laws of the United States, and that said decedent at the time of his death was the owner of said 950 shares of the capital stock of the said defendant bank, which he had never endorsed, transferred, conveyed, or otherwise disposed of, and that said shares of stock at the time of the death of said decedent stood and still stand upon the books of said bank in his name, and that each of said certificates of stock contains the following provision: "Transferable only by him or his attorney on the books of this bank on the surrender of this certificate;" that prior to the commencement of this action appellant
245 presented to the officers of said bank a duly certified copy of his letters of administration, and demanded that said stock

be transferred to him, as such administrator, upon the books of said bank, which was refused; that the said defendant, Andrew J. Davis, Jr., was and is the cashier and one of the directors of said bank, has possession of said certificates of stock, and claims some right or title thereto or interest therein; that his claim thereto has no foundation in law or equity; that he refuses to surrender or deliver up said shares of stock, although demand has been made, and that said claim and possession of said certificates of stock casts a cloud upon appellant's title as such administrator and prevents him from obtaining a transfer of said stock upon the books of said bank. It also alleges that the entire capital stock of said bank consists of 1,000 shares, and that said bank is an established institution, with a large and increasing business. The prayer is that the claim of said defendant, Andrew J. Davis, Jr., be declared void; that he be compelled to deliver up said certificates of stock, and that defendant bank be required to transfer the same upon its books and issue new certificates therefor to this appellant as such administrator.

To this complaint the defendants made separate answers. The said defendant, Andrew J. Davis, Jr., denies that said shares of stock or any of them or the certificates representing the same or any thereof were or are the property of said decedent, left by him at the time of his death; denies that said decedent was the owner of the whole or any of said stock or certificates, or that he never transferred, conveyed, or otherwise disposed of the same, and avers that said defendant is the owner and in possession of said shares of stock and the certificates thereof, and was such owner and in possession at the time of the death of said decedent. He denies that his claim to the said shares of stock and certificates thereof is without merit or foundation in law or equity, or that his claim to said stock or possession of said certificates casts any cloud upon appellant's title, or that he ever had or has any title thereto. He admits that he is and for several years last past has been cashier of said defendant bank, but denies that he now is or has been at any time since the death of said decedent a director thereof. The answer, for affirmative matter, substantially avers that said defendant, Andrew J. Davis, Jr., was a nephew of said decedent; was cashier of said bank for several years before decedent's death, and for some time before said death he had managed and attended to all the business of said bank; that in the latter part of the month of December, 1889, said decedent was and had been for some months seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died; that he was then about 70 years of age and preparing to travel to the Pacific coast for his health; that on the 27th or 28th day of December, 1889, at Butte city, in the county of Silver Bow, and State of Montana, said decedent, being seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died, but being of sound and disposing mind and in view and apprehension and expectation of his death, gave to said defendant as a gift the shares of stock and certificates thereof described in the complaint, and at the same time delivered said certificates of stock to defendant as a gift, and that defendant then and

there received and accepted the same, and that thereafter,
246 on the 11th day of March, 1890, said decedent died of said disease and ailment of which he was suffering at the time he made said gift and the delivery of said stock and certificates thereof to defendant, and he has ever since said gift and delivery held in his possession, claimed as his own said shares of stock and the certificates thereof, and now so holds and claims the same, and is entitled to have said stock transferred upon the books of defendant bank, but that said bank and the directors refused, and still refuse, to permit said transfer to be made until the rights of said parties to said stock and shares are determined by the court. The prayer is that said defendant, Andrew J. Davis, Jr., be adjudged the owner of said stock and certificates thereof; that said appellant, as such administrator, and said estate have no right or interest therein, and that said defendant bank be requested to make the proper transfers upon its books.

The separate answer of defendant bank, in substance, says that it has no interest in the controversy; that it has heretofore refused, and now refuses, to make any transfers of said stock upon its books, although requested by appellant and said Andrew J. Davis, Jr., to do so, and that it is ready to make such transfers, or whatever else the court may order it to do in the premises.

To the separate answer of the said defendant, Andrew J. Davis, Jr., appellant filed his replication, which is substantially as follows:

He denies the serious and dangerous illness of the said decedent, or that he died from any disease or ailment of which he was suffering at the time of the alleged gift, or in December, 1889, or that on account thereof the decedent was preparing to travel to the Pacific coast for his health; denies that on the 27th or 28th day of December, 1889, at Butte city, Mont., or at any other time or place, said decedent ever made the gift of said shares of stock or certificates thereof to said defendant, Andrew J. Davis, Jr., or that he ever accepted or received the same or held or retained possession thereof under any such gift, or that said decedent was of sound and disposing mind at the time of the alleged making of the same, or that he died on account of the disease or ailment of which he was suffering at the time of the alleged making thereof, and avers that the facts set forth in his complaint are true, and asks judgment according to the prayer of the same.

The case was tried to the court sitting without a jury. Upon the trial the following facts were adduced:

A. J. Davis, designated by counsel and witnesses throughout this case as Judge Davis, a resident of Butte, in this State, and for many years prior to his death president of the First National bank of that city, died March 11th, 1890, leaving an estate, exclusive of 950 shares of the capital stock of said bank, now involved in this controversy, and other valuable assets, appraised in value at $2,489,393. By accumulated profits and enhanced value during the 12 or 15 years of the bank's existence, for nearly all of which time the deceased actively and personally controlled the bank's affairs, the value of this stock when this action was begun was admitted to be

$950,000. In the latter part of the year 1889 Judge Davis was in somewhat feeble health and close to 70 years old; he had not been in perfect health for some time, and had on divers occasions told plaintiff herein, who was a close and old friend, that he was too old to recover from his ailment.

247 It appeared, too, that he had been for some time trying to straighten up his affairs and fix up everything in the bank. In November of that year he joined Judge Hiram Knowles and Hon. W. W. Dixon in a trip to Tacoma and Victoria. While away he was very nervous, worrying over money affairs, was quite feeble and ill much of the time, suffering from insomnia and pain, and often took medicine. After one particularly bad night of suffering Judge Davis wanted to return to Butte at once. So about December 1st the party came home, having been gone scarcely three weeks. Judge Davis' health declined. He was no better a day or two after his return than before he went to Puget sound. The insomnia continued and the habit of taking medicine every day or two was kept up. But his mind was perfectly clear, although he seems not to have resumed any activity in business generally, except to adjust some important and unfinished transactions, extending over seven or eight years, with this plaintiff, Talbott. The nature of this business was an accounting in mining matters in which Talbott and Judge Davis were jointly interested. It was Talbott's habit to go to the Judge's rooms at night and to proceed with the adjustment. The "figuring" connected with the settlement was done by Andrew J. Davis, Jr., principal defendant in this suit. The settlement included many items of account, and occupied three or four hours of every evening, commencing about December 19th and continuing until about the 27th, when Judge Davis executed a deed to Talbott, and thus finally concluded their business affairs. If the deceased showed fatigue occasionally, as he did, during the settlement, the matter was continued until the next evening. When all was about wound up and upon the evening before the deed to Talbott was executed, say December 27th, the Judge said to Andrew J. Davis (who was always called Andy and whom we will likewise, for convenience, call Andy), "When you come down tomorrow fetch my box down," and at the same time he told Talbott to come too.

Certain other material testimony appropriately finds place at this point. Judge Davis was a bachelor, living in a private family in Butte. He is described by certain witnesses as a very close man, sagacious, careful, and correct in business affairs, and by Judge Knowles, United States district judge for Montana, decedent's successor as president of the bank (a very confidential and intimate friend, and for a long time his counsel), as a man of few friendships, a remarkably reticent and secretive man about himself and his affairs. But he spoke freely and often of his nephew and namesake Andy. Not one, but numerous witnesses, several non-residents, and other prominent citizens of the State, testified to voluntary statements made by the decedent that Andy was a good business man, was coming out all right, and would some day own the bank. For instance, to one friend he stated in the summer of 1889 that he "never

intended the bank to go into his estate; that he always intended that for Andy, and that was what he expected to do with it." To another friend, in July, 1889, he said, "I intend to make another trip to Europe, and before I go I intend to give the bank to Andy," and afterwards said to the same friend that he wanted to call in all of his outside business, and that he had intended to give the bank to Andy. To another that it was his intention to give the bank to Andy in due course of time. And again, in speaking of
a new bank building which was being erected in the
248 summer of 1889 the decedent remarked, "As the bank belongs to Andy, you will put in a set of rooms, bath-room, and everything complete." To others he remarked that the bank would be Andy's. To still another friend and former employé, in speaking of business generally, he said the bank was "Andy's, and he considered it Andy's and wanted it so considered; * * * that he was not giving him much—a hundred thousand dollars and what it earned." To an old business acquaintance he said in 1888 that "he hoped that Andy's sickness (at the time Andy was sick and at some springs away from Butte) would not amount to anything, because he wanted him to be well before taking charge of the bank, because he intended to give him the bank and wanted him to be a healthy man." To a national bank examiner, in August, 1889, when it was suggested that the responsibilities of being cashier of the bank were great for Andy, the decedent replied, "That will be all right, as Andy will some day get the bank, anyway;" and afterwards, in October, 1889, he repeated this conversation, saying that Andy should have it all when he was gone. To a banking friend from Omaha, whom he met in November on the steamboat going to Victoria, he said his health was very poor, and that he had started to take a trip to Japan, hoping to be improved by the sea voyage, but that he did not know whether he would be able to continue or not, as he was feeling very poorly; that he had built up the bank in Butte by his own personal efforts and had made it the best bank in Montana and had a great deal of pride in it and had trained his nephew, Andy, to the business, so that he could take sole charge of the bank after his death, and when he got home he expected to give over control of the bank to him and intended to give the stock of the bank owned by him to Andy, and that it was his intention that Andy should eventually be the manager of the bank, and that he would leave his stock in said bank to him. To the physician of Andy, likewise an old friend of decedent's, when told that Andy's constitution was not strong enough to enable him to work in the bank from morning until night, he remarked, "Andy knows very well that that bank will belong to him some day." To another friend, who had had charge of his business in Butte for a number of years, he related the history of Andy's coming to Montana, and said that before Andy had come he had consulted Mr. Story, of the Chicago Times, about the boy, Andy; that Story had spoken well of him; that frequently, from the year 1884 up to nearly the time of his death, Judge Davis had spoken about Andy; said that he was getting along nicely, and that he wanted the bank

to remain in the Davis family and in the Davis name and under Davis management, even after his death, and that he expected the bank to fall to Andy when he died. The decedent had brought Andy to Montana when a boy, years before, and put him to work in the bank, where the young man's industry and business capacity had so impressed themselves on his uncle that he made him the cashier about 1887. The evidence is that he loved his nephew and regarded him as a father would a son. "He was the only person," said Judge Knowles, "that I ever knew Judge Davis to exhibit any particular warmth or affection towards." He was solicitous of Andy's health. When he was sick he watched him, consulted physicians about him, and "he seemed to feel differently towards Andy than to any one else that was around him."

249 But to resume the interview at the decedent's room on the night following the one when the box was brought down. Talbott, the plaintiff herein, was there in obedience to the Judge's request. Andy came in later. Judge Davis soon came up from downstairs and joined them. Talbott was the only witness who could testify to the facts constituting the alleged gift. Talbott was a friend of the deceased and of Andy. He had been intimately acquainted in business and other ways of life with Judge Davis for 18 or 20 years; was an officer of the bank before and after decedent's death, and interested more or less in certain business ventures in which Andy was interested. This is Talbott's account: The three sat about a little table or desk in the middle of the room. Upon this desk were pen and ink. The decedent had the key and unlocked the box—an ordinary black tin box. He pulled the papers out all together and put them on the table. He looked around for a while and finally said, "Where is all of this? This isn't all. There is something that is not here." "It appeared," said Talbott, "that he got them all pulled out together and did not get them all." Andy said that he guessed they were all there, and after figuring the number of bank-stock certificates he told his uncle they were all there. "Well, now," said the Judge, "there is fifty shares in the directors' hands." Thereupon he enumerated the directors, and it appeared as if one (Hauser) had never executed any paper to show how he held the stock evidently standing in his (Hauser's) name. The Judge then told Andy to write to Hauser and see that he signed a contract, and to do it right away. Both the Judge and Andy found the stock all right then, and the 950 shares were accounted for in several (4) certificates. Andy, after counting the stock up and showing his uncle what there was of it, passed the certificates over to Judge Davis. The Judge took them and passed them back to Andy, saying, "I have always intended that for you; you take that," or as the witness said, in response to another question by his counsel asking him what Judge Davis said, "I have always intended that for you and I want you to take it." Andy took the stock and put in his pocket. The witness Talbott described his feelings as follows: "Well, Andy took it, and I sat there, and it was a kind of surprise to me. I didn't expect anything of that kind. I didn't know what he did. I supposed he had his business or maybe would

fix his business in a different way; but he did that, and he said, 'I always intended to do that and now I will do it.'" Talbott and Andy then commenced talking to Judge Davis and telling him that they did not think he was so ill as he might think. To this the decedent replied, "Well, I am an old man and there is no telling. I can't stand what I used to stand. I don't think I can get over this disease. I can't stand it. I am too old. I can't expect it." The witness Talbott, when asked what Judge Davis said in reference to his expectations of recovery or not, answered that the Judge said, "You might think it, but I don't. I only hope it will be so, but I don't think it." Thereupon Andy and Talbott told him that they thought he would recover if he would go down there (meaning the Puget Sound country) and give his business up and not be bothered about it, but the Judge said, "He didn't think it." He was "going to try it, anyway." "I will get ready and go in the morning," said Judge Davis. The interview seems then to
250 have terminated. The certificates of stock had no written or printed assignments indorsed upon them of any kind. The delivery was unaccompanied by any writing at the time. Andy took the box away with him to the bank, the four certificates of stock being in his pocket at the time they left Judge Davis' rooms. Upon the next day, in company with John A. Davis, his brother, the decedent left Butte for Tacoma, in the State of Washington.

On January 14th, 1890, a trifle over a fortnight after the Judge had gone West, the annual meeting of the stockholders of the bank was held. The minutes of the meeting show that at that meeting John E. Davis, a brother of the defendant, under a proxy signed by Judge Davis, represented and voted the stock in question, and Judge Davis was one of the directors and president chosen at that meeting. The proxy bears date December 24th, 1889. It therefore antedates the interview just detailed as of December 27 or 28, 1889. The proxy is in the usual form, giving authority "for me and in my name to vote 950 shares of the stock of the First National Bank of Butte, owned by me and standing in my name on the books of said bank, at the annual meeting of the stockholders thereof to be held for the election of directors on the 14th day of January, A. D. 1890, pursuant to law." John E. Davis testified that he voted the stock at that meeting under the proxy for Judge Davis for president; that the proxy was given to him by Andy at the bank at the meeting of the stockholders; it was the first time he had ever seen it. The witness said that the body of the proxy was in the handwriting of Andy. As the witness' name was inserted in a different ink, the proxy was probably in blank when signed. Witness said that he had never had any conversation with Judge Davis in regard to this proxy or any direction from him as to what officers and directors he should vote for under it; that he voted the way Andy told him, and after he voted he handed the proxy back to Andy. Judge Davis continued to be president of the bank until his death. So far as the testimony shows, he had no knowledge of said election of himself as president or of his holding said position, and never did any act

as president of said bank from the time he handed the certificates to Andy.

In the early part of February, 1890, Judge Davis returned from his second trip to the west coast. He failed considerably in health during his absence. He talked very low to those whom he met upon his arrival and was feeble and very ill. Judge Knowles and Andy went with him to his room that night. He said to Judge Knowles, "I want to see you tomorrow." The next day Judge Knowles called. He found Judge Davis' physical condition bad. Continuing, Judge Knowles said, "He had lost ground since I had seen him * * * At this time, when he went up to Tacoma, and some time before that, he was all the time trying to straighten up his affairs, as he claimed, and fix up everything in the bank. He would go into the bank and take out the bills payable to the bank and look over them and examine them all, and those he did not think were just right he wanted them fixed up. He wanted everything fixed up, he said. That was before he went to Tacoma and afterwards. He did not state to me for what reason he wanted them fixed up. You must remember that Judge Davis was a remarkably reticent and secretive man about himself and his affairs. He
251 was a good talker about other people's affairs, but he was a very secretive man about his own affairs and about himself. * * * Well, he was accustomed to talk along the last about Andy, as he always called him—his business capacity, and in a very characteristic way.

He would pump me as to my opinion about him, and then he would compare him to himself. He would say, 'Now, I was just a little fellow, just like Andy, and he will come out all right.' * * * As to his affection, I think that Andy is the only person that I ever knew Jude Davis to exhibit any particular warmth or affection towards. He was a man that had few friendships, and Andy was one of his particular favorites. If he was sick, he was always uneasy. He was sick in the bank here once; he had a room in the bank, and the Judge would go in and look at him, and he would not say anything particular to him, but he would rush right off and see the doctor and ask him about what he thought of Andy, and ask if he was very sick or something of that kind, and he seemed to feel differently towards Andy than to any one else that was around him. * * * Judge Davis was quite sick, and I had gone in there and talked with him about his trip and his health, and he said, 'I wish to make some presents.' He went on and stated that he wanted to know if I thought he was sound enough in mind to make these presents, and he had a long talk about any probability about his going insane, and I went on and discussed with him what I had read upon these subjects of insanity and brain diseases. The conversation was probably an hour long, and in this conversation about the presents he first said that he wished to give ten thousand dollars to the public library of Butte. Andy wanted him to, and he understood that Charlie Larabie had given ten thousand dollars, and he wanted to give ten thousand dollars to meet that. Then he said there was a lady here whose husband had helped him considerably,

and he wanted to make her a present, though he said he had paid him for everything he had done that he asked, but he wanted to make her a present. He said something about W. E. Wehrspaun's little girl, but exactly what was said about that I don't remember. Then he said there were two persons in the States that he wanted to make presents to, and in this conversation he said, 'Andy is to have the bank' or 'control the bank.' I don't know which now, or he might have said both. That was all that was said particularly about Andy in that conversation—that is, as far as that matter is concerned. The balance of it led up to a legal matter. The interview was to be renewed. He was not to attend to any business or go up to the bank, or anything of that kind; and in three days from that time I was to be there, and we would straighten up his affairs." This question was then asked Judge Knowles: "In this conversation with reference to Andy did he say that he wanted to give the bank to Andy?" Judge Knowles' answer was, "He did not. He said, 'Andy is to control the bank' or 'to have the bank,' and I think he may have said both, because this conversation was fully an hour long, and I don't know but more." On the cross-examination of Judge Knowles the following testimony was given: Q. This conversation that you refer to, in which he spoke of giving Mrs. Wehrspaun's daughter something, and also to the library ten thousand dollars, and also something to the lady here, and also that Andy was to have the bank or control the bank was after his return from Tacoma, was it? A. The last time;
252 yes. It was his last trip to Tacoma. Q. I believe you say that it was understood that you were to return within a few days and fix up these matters for him? A. No; it was not to fix up these gifts exactly. The return was with the view of writing a will and fixing everything in that way." On his redirect examination Judge Knowles continued as follows: "My object for returning then was to draw a will. That was the legal matter that came up. The other matter was my opinion as to his physical condition and capacity to make these presents that he was going to make." Thereupon the judge of the court asked Judge Knowles whether the statements made by Judge Davis to him concerning Andy and the bank were in the course of professional employment by Judge Davis. Judge Knowles replied that he did not consider it a professional matter, but a personal one, and that Judge Davis' consultation in relation to these gifts was in a friendly way. Judge Knowles states that he was anxious that Judge Davis should fix up his matters by a will at that time, and the conversation led finally up to that proposition; but Judge Davis did not ask Judge Knowles about a will or making a *any* will, but he spoke to him about making these presents, and whether he (Judge Knowles) thought that he (the decedent) was mentally capable of making these gifts. At the expiration of three days Judge Knowles called again. He found Judge Davis insane. His reason never returned to him, and he died of his ailment on March 11th thereafter.

Shortly after Judge Davis died, about April 19, 1890, on a hearing in reference to the inventory or concerning the amount of

property to come into his hands as special administrator of the estate of the deceased, the plaintiff herein. Talbott, was a witness. At that hearing Talbott, among other things not material to be reiterated, testified substantially that Judge Davis gave Andy the stock: that the decedent looked the stock over and gave it to Andy and said he did not know whether he would ever come back or not; there might be an accident on the railroad; that he (Talbott) and Andy told decedent they thought he would come back and assured him that he would live ten or fifteen years; that decedent had said the train might jump the track and kill him, and "if I don't come back or anything happens I want you to have that." Upon the trial of this case Talbott was cross-examined concerning his former testimony: "Q. Is that your language? (As used on the former trial.) A. Well, that is about the sum and substance of it: that he wanted him to have the stock." Talbott further said upon this trial, upon cross-examination, that at the former hearing he had detailed, he thought, about what transpired, and that he had testified that Judge Davis was going to the coast, saying he was going down to see if it wouldn't do him good again; it was the best place he had found in all his travels. He said that if he detailed anything different upon the trial of this cause from what he had said upon the first hearing "it cannot be much different, because it is all in the same meaning, the same idea. I cannot see where it would make any difference particularly. I gave the language as near as I could, to the best of my knowledge and judgment." On redirect examination the witness was asked whether on the former examination he had stated everything. He replied, "No, sir; I didn't state everything. Q. Have you upon this examination stated everything that occurred, as well as you could remember?
253 A. I think so; everything that would be connected with the case. There were little things came up there, talking about different things, but nothing about the gift or anything. Q. You stated in your former examination, as read to you, that Judge Davis said that something might happen to him—the train might run off the track. How did he come to make that remark? A. The reason was that we told him, you know, that we didn't think—tried to brace him up and make him think that he was not so bad off, you know; and then it was that he said the train might jump the track and he get killed in that way. He said, 'You are taking chances all the time when you are on a train,' or something to that effect. That was how that came about." The witness then said that he had testified upon the first hearing without knowing that he was to be called upon and without having given any particular thought to the matter. Thereupon this question was put to him by respondents' counsel: "If there is any difference in the statement that you gave in your testimony before and that you have given now, which would you say is correct? A. Well, I think that the statement I gave to day is as near correct as I could give it, then or any other time. I don't see how I could better it any. There might be a word here and there that would mean a little different, but at the same time it all means the same to me when I come to

put it all together." Here was the recross-examination: "Q. There may be, you say, have been some things transpired that you did not testify to on the former trial; but what facts you did testify to on the former trial are correct, are they not—the facts? A. Well, I should say that they were; yes, sir. Q. While you might not have remembered some things that you testify to now, what you did testify to then is correct? A. Yes, sir."

The by-laws of the bank are made part of the case. So far as material, they provide that the regular annual meetings of the stockholders for the election of directors should be held on the second Tuesday in January of each year. The directors-elect were required to meet for organization, upon notification given by the cashier, within one week from the time of their election, and should do no business whatever prior to qualifying, by taking the oath of office as required by law. The president was to hold his office for the current year, and was to be elected by the board of directors. By-laws Nos. 21, 22, and 23 provide as follows: "(21.) The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the restriction and provisions of the banking laws, and transfer book shall be provided, in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board of directors by any stockholder who shall be liable either as principal, debtor, or otherwise. (22.) Transfers of stock shall not be suspended preparatory to the declaration of dividends, and unless an agreement to the contrary shall be expressed in the assignments, dividends shall be paid to the stockholders in whose name the stock stands at the date of the declaration of the dividends. (23.) Certificates of stock, signed by the president and cashier, shall be issued to stockholders, and the certificates shall state upon the face thereof that the stock is transferable only on the books of the bank." It also appears that on
254 December 9, 1889, the regular meeting of the stockholders was called to be held at the office of the bank on Tuesday, January 14, 1890. This call was signed by Andrew J. Davis, Jr., respondent herein, as cashier. Pursuant to this call a meeting was held, as the following extract of the minutes will show: "Present: Andrew J. Davis, by proxy to J. E. Davis; Hiram Knowles, and A. J. Davis, Jr. On motion, Hiram Knowles was chosen chairman and Andrew J. Davis, Jr., secretary. On motion, duly carried, it was resolved to proceed to the election of directors, and Hiram Knowles and John E. Davis were chosen judges of the election, who announced the following directors duly elected, receiving nine hundred and seventy votes each: Andrew J. Davis, Hiram Knowles, S. T. Hauser, W. W. Dixon, James A. Talbott, A. J. Davis, Jr. The meeting then adjourned. Andrew J. Davis, Jr., secretary. Attest: Hiram Knowles, chairman."

W. C. Darnold, a witness for the defendant, testified that he was well acquainted with the decedent, having been in his employ for three years; that after the return of Judge Davis from Tacoma the last time he was out of employment, and, being unfriendly to Andy, he called upon Judge Davis himself to solicit his friendly offices to

btain a situation, somewhere between the 1st and the 6th of Feb-
uary, 1890, and that Judge Davis then told him that he had given
he bank stock to Andy and had not any control over it, and that
e could not do anything, but that when he got up he would help
im; that at that time Judge Davis was very low; could only speak
wo or three words, and would keep quiet for a moment or two and
hen speak again. Upon cross-examination Darnold said that no-
ody was paying him to remain in Butte or to testify as he did;
hat he was out of employment at the time and was living with Mr.
. R. Boyce, Jr.; that he had never mentioned to Mr. or Mrs. Boyce
hat he had heard Judge Davis say, and he had no recollection of
aving made any statement to the Boyces that his testimony in this
ase would be a "clincher." J. R. Boyce, Jr., referred to in the tes-
imony of Darnold, was called on the part of the plaintiff and testi-
ed in substance that Darnold was working for J. R. Boyce, Jr., &
o. as a book-keeper until about the 1st of March, 1890; that he had
eard Darnold say that Judge Davis said in 1887 that he intended
he bank for Andy; that about two weeks before the trial of this
ase he heard Darnold say that he would testify herein and
ould be the last witness, and that, although he did not state what
e was going to testify to, yet he had given the witness to under-
and that all he (Darnold) knew about the case was what Judge
avis had told him in 1887. Mr. Boyce did not produce any books
o verify his statement that Darnold left his employ about March 1,
890, and his testimony concerning that point was from recollec-
on, although the books were at Boyce's house at the time of the
ial.

The court found the issues in favor of the defendant Andrew J.
avis, Jr., and rendered a decree in accordance with the prayer of his
nswer, adjudging him to be the owner of all the shares of stock
escribed in the complaint and the certificates thereof and entitled
o have the same transferred to him on the books of the bank, di-
ecting The First National Bank of Butte, defendant, to make such
ansfer and to issue to said Andrew J. Davis new and proper cer-
tificates therefor.

55 A motion for new trial was made, based upon assigned errors in admitting evidence of decedent's estimate of Andy's usiness qualifications and in admitting the testimony of John E. avis that Andy directed him to cast the 950 shares of stock for the leged donee for director, for the purpose of showing the exercise dominion and control over the stock by Andy in the absence and ithout the knowledge of the decedent. Nearly all the other errors signed are involved in the legal propositions discussed in the inion. One ground, however, of motion for new trial was newly scovered evidence. J. R. Boyce, Jr., who had been a witness, made affidavit to the effect that Darnold had stated to him on or about ly 1, 1894, that he had never had a conversation with Judge Davis the subject of Andy's becoming the owner of the bank since 86 or thereabouts, and that the conversation which Darnold had stified to as having occurred in February, 1890, was not true; that July 11th, 1894, Darnold asked the witness to go with him to see

Mr. Stapleton, and that there, in the presence of Mr. Stapleton, Darnold said that his former statements on the trial of this case were not true. One John H. Curtis also filed an affidavit to the effect that about July 10th, 1894, he had heard Darnold make a statement to Boyce that he (Darnold) had made a demand upon Mr. Davis, respondent, for $10,000, which would enable him to go into business in Ohio, and that if Davis did not give it he intended to go to the attorneys and tell them that he misrepresented his statements on the witness stand. As counter-affidavits the respondent Andrew J. Davis filed the statements of W. I. Lippincott, Guy X. Piatt, and himself. It appears by these statements that there was a controversy pending between the bank and J. R. Boyce, Jr., in which Boyce claimed that Judge Davis, deceased, was a partner in business with him, and attributed a suit which had been brought by the bank against the firm of Jas. R. Boyce, Jr., & Co. to the enmity of respondent Davis. Respondent Davis himself stated in his affidavit that he had caused an attachment to be levied in behalf of the bank on the stock and merchandise of said J. R. Boyce, Jr., & Co., and from that time Boyce had entertained unfriendly feelings towards him: that since the trial of this suit in the district court Boyce had solicited him to join in a scheme to buy up the claims against the firm of Boyce & Co. jointly with him, and together they would prove that A. J. Davis, the deceased, had been a partner in business with Boyce, and thus the amounts of said claims could be collected. Davis refused to enter into this arrangement; that on Friday, July 20, 1894, Boyce told Davis that he had evidence in his (Boyce's) pocket that would "upset his case;" that the other side wanted said evidence, but he would not let them have it if he (Davis) would agree to go in with him to buy up the claims of the creditors of said Boyce & Co. and then hold the Davis estate for them; that Boyce gave him until noon the next day to decide what to do, giving him to understand that if he did not go into the arrangement he proposed he would use the evidence which he claimed to have against him; that upon the next day respondent Davis told him he would have nothing to do with the arrangement he proposed. Darnold himself filed no counter-affidavit. It is unnecessary to recapitulate more fully the terms of the several affidavits used on motion for new trial. The affidavit of Mr. Wellcome was filed too late
256 to be considered. The motion for new trial was overruled, and from the order overruling the same and from the judgment the plaintiff appeals.

Opinion of the Court by Hunt, J.

As is often, perhaps generally, the case in suits where property is claimed as a *donatio causa mortis*, the court is not seriously embar-assed by conflicts in the testimony. When the idea pervades the mind that death is certainly close at hand, and that it is a fitting time to act in relation to property affairs, with a view to their disposition in case of death, a reflecting sense of the occasion whereon they may act bids men seek the unobtrusive confidence and privacy

of close friendships, trusted counsel, or strong ties of consanguinity. It therefore happens that our duty in judicially considering this case is not made so difficult by deciding which of various accounts of the transaction is true as to correctly weigh what was said and then to ascertain what are the correct legal principles to control, and apply them to the facts as they stand without material contradiction or dispute. Now (1), what was the intention of Judge Davis? What is the evidence in point of fact? How strong is it and of what weight? And (2) to what legal results must that evidence lead us?

Here was a rich old man, who felt that he and his wealth must soon be parted. With nearly 70 years of busy life behind him, his time to lay down its cares had come. Ill health and disease were in him and he knew it. Premonitions of death, well-founded apprehensions that he was too old to recover, bade him adjust his business. With no family ties to make his life less within himself, reticent of speech concerning his own affairs, this old millionaire evinced but one genuine attachment in the ebb of his life. To his namesake and his nephew his heart went out in quiet, undemonstrative solicitude as it did to no one else on earth. Business confidence, accompanied, no doubt, by a disposition natural to one in Judge Davis' situation, yearning for some one in whom his affections might center, prompted him to select Andy of all others to uphold his name and perpetuate the particular pride of his business career—the First National Bank of Butte. "Andy will have the bank some day. Thus it will remain in the Davis family. Thus it will remain under Davis management. I will let it form no part of my estate. Bring me my box and let one trusted friend witness my contemplated act." There we observe method. There we find unreserved indications of a fixed plan to give the bank to Andy and mark intelligent preparations to execute the plan. There, too, was the fast-declining health and the expectation of death soon to come from disease already upon him. Alone in his bed-room with his nephew and friend, the mind of the decedent still bent on the plan already instituted: First, the exact verification of the number of certificates of shares. Then, without delay, with his own hand, a tradition of the certificates to his nephew. "I have always intended that for you and now I will do it." There was the act which proved the sincerity of the intention to give.
257 There was the execution of the plan in view when the box was ordered brought down. There was the proof that the bank was not intended to be part of the estate, and there, withal, was the hovering apprehension of death moving the donor to execute his plan without delay. Andy took the stock and put it in his pocket in his uncle's presence. There was an acceptance of the gift. The scene at night; the delivery itself upon the eve of departure to fight against the inevitable. The words, the enfeebled health and age of Judge Davos, the magnitude of the gift, all naturally suggested to his two listeners that he anticipated death very soon. Straightway his nephew and friend, in a spirit of hopefulness and sympathy incident to such solemn occasions, told him they did not think him

so ill. "The train may jump the track and kill me. * * * If I don't come back or anything happens, I want you to have that. * * * I am an old man, and there is no telling. * * * I don't think I can get over this disease. I can't stand it. * * * I can't expect it. * * * I only hope it will be so, but I don't think it." There were the serious words of a very sick man, who believed that death was close at hand. The last expressions were born of that hope which is in the mind of nearly every man until the last vital spark is extinguished. Then the departure to Tacoma. In that act we find an additional reason for the previous conduct of the donor. He was going away with, at most, a faint hope of recovery, and realized that he might never see Andy again. The opportunity was ripe for the execution of his long-announced plan. "Now, take it." He believed the bank was severed from any estate he might leave. Andy had the bank, he thought, and it would forever remain in the Davis name and in the Davis management. The human object of his affection had been considered in the manner he had said he would regard him. All other material affairs might rest upon the possibility of future action. So far as Judge Davis was concerned, the purpose towards which his thoughts were directed was accomplished. He believed on that night that his plan was consummated.

The appellant would break the force of all these facts and circumstances by arguing that the testimony discloses an intention on the part of the decedent when he died to give Andy the bank stock. He urges that the decedent knew the by-laws of the bank and the national banking laws, which said that no transfer of stock could be made except by the assignment thereof and transfer upon the books, and that, if he intended to divest himself of his title, he would have used the pen and ink so close at hand; but the by-laws did not require any indorsement or assignment or power of attorney, in writing or otherwise, upon the certificates of the stock or elsewhere to transfer them, but only an assignment or transfer on the transfer book of the bank. There was no provision that even this assignment or transfer must be made by the stockholder or his attorney. The certificates stated on their face that the stock was transferable only by the holder or his attorney on the books of the bank on the surrender of the certificates. There was no assignment or power of attorney on the back of the certificates given to Andy. The by-laws required no blank for such a purpose. To make the transfer on the books of the bank would have required the presence of the transfer books and a surrender of the certificates; but the
258 books were not at hand. The mind of the donor was upon one essential feature as alone indispensable to his purpose— the actual surrender of the certificates themselves. Thus would he part with the representatives of his ownership. This, he thought, was the all and only important act of his intended gift. And this he did. Next, as to the words spoken in the decedent's room. The appellant would do away with our view by quoting the testimony of Talbott given on a former hearing. We agree with the learned counsel for the appellant that the statements of Talbott on the for-

mer hearing ought to be considered with those given upon the trial of this suit; but, in considering them, we bear in mind that there is no contention or insinuation by the appellant that Talbott has testified falsely. The lower court must have believed that, in his testimony, he tried to hold hard to the truth, and we shall treat his several statements as complementary of one another. The salient points are conspicuously and uniformly brought out, namely, the actual and perilous sickness of Judge Davis and the actual and manual delivery of the certificate to Andy by way of gift. The assurances were then made by Talbott and Andy to Judge Davis that he was not so ill as he thought himself. Thereupon Judge Davis, not wishing to dwell upon so painful a subject as death, and to parry further reference to his physical condition, expressed the possibility of being killed in a railroad accident and added, "If I don't come back or anything happens to me, I want you to have that." Then followed the further statements by Judge Davis to the effect that he could not expect to recover from his disease. This must have been the exact situation at the interview, for Talbott expressly says the way that Judge Davis came to make the remark about the train jumping the track and killing him was because he and Andy tried to "brace him up, make him think he was not so bad off, you know," and after that remark Judge Davis said the train might jump the track. This statement of Talbott's, that the remarks of Judge Davis were not made until after the tradition of the certificates themselves, is of importance and greatly strengthens our opinion that there were no qualifications to the gift other than those inherent in all gifts *causa mortis*, and that the donor intended none other to be attached. It must never be forgotten that, just before the Judge made any remarks, he had delivered the certificates, without any words of qualification, and this act properly aids us in interpreting the meaning of the donor in his subsequent words. Thornton on Gifts, p. 122.

The stock certificates had been delivered. The intention of Judge Davis was executed. If Andy and Talbott had prepared to leave the room at once, would Judge Davis have said anything more about the gift? We think not. Or if, remaining, they had made no reference whatsoever, after the tradition, to his physical condition, is it not reasonable to say that no other word would have been spoken on the subject of the gift by the donor himself? We think so. The very fact that the statements were not called out except by way of response to the remarks of Andy and Talbott, in the light of what Judge Davis had done before, makes them but explanations of the reason why the donor had given the certificates to his nephew at that particular time. This construction of the remarks of Judge Davis, after the certificates had been delivered, is not only consistent with the prior acts and statements of the donor at the moment of the delivery and gift itself, but is in strict
259 accord with his intention, as manifested by repeated prior declarations to friends; but, if we are in error in that reasoning, let us follow the theory of appellant's counsel and consider all the acts and the conversation together as forming essential and

inseparable parts of the acts of delivery. To proceed, then. Suppose the donor had said, at the time he handed the certificates over, "I always intended that for you. I want you to take it," and then added, "If I don't come back I want you to have that. I am an old man and cannot expect to recover," then appellant's argument that the condition of death while away at Tacoma was attached to the gift would have been of force, and a return might, *ipso facto*, have operated as a revocation of the gift. We here remark that we attach no significance to any fear on the decedent's part of being killed by a railroad accident. That idea is, in our judgment, incompatible with the evidence of every act and word and thought of the donor at the time of the delivery of the certificates. Death from his illness was the only current of his thoughts.

But the foregoing line of reasoning cannot be pursued without departure from appellant's theory, because it eliminates another and material part of the statement of the decedent, namely, the alternative condition, "or, if anything happens, I want you to have that." Let us, therefore, take up this further qualification, and, by adding it on, we have these words: "I have always intended that for you and I want you to take it. If I do not come back or anything happens I want you to have that. I am an old man and cannot expect to recover." Considered with the act of delivery of the certificates, we find that the gift was not limited to the event of death on his trip only, but comprehended death at any time in the near future. Now, if we put the several whole sentences together and connect them exactly with the delivery we have this condition of testimony: Judge Davis: "I have always intended that for you; now take it." The certificates are handed over. Talbott: "You are not so bad off as you think." Judge Davis: "I don't know whether I will ever come back or not. There may be an accident on the railroad. If I don't come back or anything happens I want you to have that. I am an old man and there is no telling. I can't stand what I used to. I don't think I can get over this disease. I can't stand it. I am too old. I can't expect it." Talbott: "We think you will come back and that you will live 10 or 15 years." There we have one portion of the sentence, "If I don't come back or anything happens," imposing conditions of death before a return from Tacoma, and the succeeding and last portion expressly, without conditions whatsoever, pertaining to the particular journey about to be begun. Here the argument of appellant must be that the qualification or limitation placed upon the first portion of the sentence governs the latter as well. If this be correct we render the latter portion of the sentence, namely, the words "or, if anything happens, I want you to have that," entirely superfluous and meaningless. They are ignored; but, if they were meaningless, why did the donor express them? Surely, if everything said is part of the gift, no construction can be accurate which would omit to give some effect to these latter words, as well as to all others. The only way to do so is to interpret the whole sentence by the light of all else done and said, before and afterwards. Doing this, the donor
260 said, "Take this stock. I have always intended to give it to you and now I will do it. I believe I am a dying man.

I have but little hope of recovery. If I do not live to come back, or if I die soon, then this stock is absolutely yours."

We cannot say by which process of reasoning the district court was moved to adopt its primary conclusion that Judge Davis intended a gift *causa mortis* at the interview on the night before his departure for Tacoma. The first view, in our opinion, is correct and we adopt it, but both analyses of all that was said and done lead to the same logical deduction. Each is built upon the firm and unshaken evidential foundation of an oft-repeated intent of the donor to give the bank some day to Andy, and upon that other and most convincing act, the manual delivery of the certificates by Judge Davis while in a condition of health, which clearly evinced his apprehension of speedy death. We cannot find in our consideration of the case up to this point substantial support for the argument that by any words or acts of the donor prior to his departure for Tacoma he intended the gift to be dependent only upon his failure to return to Butte, for no matter what refinements may be given to the language of the donor, no force of speech at this time can overcome the fact that the donor, sagacious and close man that he was, parted with the certificates. Probably, too, Talbott's language was not, at the first hearing (which was not a trial of the ownership of the stock), precise in its details of the occurrence, for he says that he does not see any substantial difference between what he said at that time and upon the trial of this case; but, assuming that what he said on each trial was an exact statement, we certainly cannot now say that the district court was not warranted in its conclusion that the donor intended to give the stock to the donee at the time of the delivery thereof. The finding, therefore, to that effect must be sustained unless subsequent events, by themselves or in connection with preceding affairs, overthrow the finding, or the law will not permit it to stand.

The appellant opens his exhaustive argument with reference to the early English text writers and their definitions of gifts *causa mortis*. We will therefore go further back than he does and briefly examine the law to determine whether his primary inferences are sound. If we revert to the Institutes of Justinian, published A. D. 533 (Imperatoris Justiniani Institutiones, by J. B. Moyle), we find the first definition of the essential conditions of a *donatio mortis causa* as a primary source of the meaning adopted in the common-law reports of England and in the decisions of many of our own most learned courts. Omitting the Latin text and accepting the translation of Professor Hammond (Sandars, Justinian, p. 218), we find: "A donation *mortis causa* is that which is made to meet the case of death, as when anything is given upon condition that if any fatal accident befalls the donor the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given. These donations *mortis causa* are now placed exactly on the footing of legacies. It was much doubted by the jurists whether they ought to be considered as a gift or

as a legacy, partaking, as they did in some respects, of the
261 nature of both, and some were of opinion that they belonged to the one head, and the others that they belonged to the other. We have decided, by a constitution, that they shall be in almost every respect reckoned among legacies, and shall be made in accordance with the forms our constitution provides. In short, it is a donation *mortis causa* when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir." The original text adds a line illustrating gifts *causa mortis* by reference to the Odyssey of Homer, where Telemachus makes presents to Piræus if he be killed. Sandars then proceeds to elaborate the text as follows: "There are two essential conditions of a *donatio mortis causa*. It must be made with a view of meeting the case of death; it must be made to take effect only if death occurs, and so as to be revocable at any time previous, and to fail if the recipient died before the giver. The donor might, however, at his pleasure, alter the character of the gift, making it irrevocable, but it was always dependent on the recipient outliving the donor. * * * It might be made conditional upon death in two ways. The donor might say, 'I hand you over my horse, but the gift is only to be complete if I die in this enterprise.' Or he might say, 'I give you my horse; if I survive this enterprise you are to give it back to me.' In the latter method the delivery of the thing is made at once, subject to a conditional redelivery. In the former the delivery is made conditional. * * * If the gift was made in the first of the two ways above mentioned, although there was delivery, yet the thing was only acquired on the death of the donor, and, the donor not having ceased to be *dominus*, could therefore, if he revoked the gift, bring a real action to reclaim the thing handed over. If the gift was made in the second way the whole property passed at once by the tradition to the recipient, and, as in the older and stricter law, the *dominium* passed absolutely when it passed at all, the property in the thing could not revert to the donor merely by the condition having been accomplished. He would only have a personal action against the recipient to compel him to give the value of the thing, if he did not choose to give back the thing itself. The later jurists seem, however, to consider that the *dominium* reverted *ipso jure*, and that the donor could bring a real action for the thing itself." Page 219. In these definitions it is to be observed that the distinctions between conditions precedent and subsequent is not as closely drawn as the test of whether the gift may be upheld, as by some modern authorities. Such gifts were regarded as standing "midway between legacies and gifts *inter vivos*. In that it consists in a present act of bounty, it differs from a legacy, which confers no right whatever on the legatee until the testator is dead and his heir has accepted the inheritance. Here, if the donee outlives the donor, the thing given never goes to the heirs at all. It differs from the latter in being absolutely perfected only by the donor's decease. The gift may be made so conditional on that event that the property in the gift does not pass to the donee until its occurrence. In the

meanwhile he has only its use and enjoyment, or the property may pass at once, subject to the understanding that it is to revert to the donor in case of his proving the better life." Moyle's Comments on Justinian's Definitions, p. 222, note 1.

262 Inasmuch as the appellant founds his discussion of the description and nature of *donationes causa mortis* upon Swinburne, who wrote in the latter part of the sixteenth century upon the civil law, we give that commentator's definition:

"One, when the giver is not terrified with any fear of any present peril, but, moved with general consideration of man's mortality, giveth anything.

"Another, when the giver, being moved with imminent danger, doth so give that straightways it is made his to whom it is given.

"The third is when any being in peril of death doth give something, but not so that it shall presently be his that receiveth it, but in case the giver do die." Swinburn on Wills, Powell's edition, 1803.

The earliest decisions, next after Swinburne's text book, to which we have reference, accessible, begin with Drury *v.* Smith, 1 P. Williams' Reports, 405, where Lord Cowper, in 1717, held that where a testator, in his last sickness, made a gift and the possession was transmuted to his nephew, it must be upheld, because "he might, in his lifetime, after the making of his will, give away any part of his estate absolutely, and, by the same reason, notwithstanding the will, give away any part thereof conditionally, and this gift, being so fully proved," was held to be a *donatio mortis causa*. That a delivery has always been held necessary in England is also sustained by Lawson *v.* Lawson, 1 P. Williams' Reports, 441, where a gift was made by a husband, in his last sickness, to his wife of a purse with money in it. Miller *v.* Miller *et al.*, 3 P. Wms.' Reps., 356; Sir Joseph Jekyll, master of rolls, decided this case. Just before death the testator called to his servant to reach him his pocket-book, took thereout two bank notes for £300 each, and another note for 100 lbs., being a cash note or payable to bearer, all of which notes he ordered his servant to deliver to his wife, who was present. Afterwards the testator, by word of mouth, gave her his coach and horses. The gift of the £600 notes was sustained upon the ground that the party was in his last sickness, and that they were delivered. The next case, and what may be termed a leading one in England, was Lord Hardwicke's opinion, in 1752, in Ward *v.* Turner, 2 Vesey, Sr., 431. It cited the last two cases just above referred to, sustaining the doctrine that there must be an actual delivery. The deductions from the discussion in that case are well summed up by an English writer (Shearwood) in an Elementary Outline of the Principles of Equity. He says that Lord Hardwicke decided that a gift of this description, in order to be valid, must be made (1) in such a state of illness or expectation of death as would warrant a supposition that the gift was made in contemplation of that event; (2) on condition that it is to bee-me absolute only upon the event of the donor's death; it follows from this that it is a gift revocable during the donor's lifetime; (3) there must be actual delivery.

Advancing, next, to the time of Blackstone, that commentator

treats this species of gift as "another death-bed disposition of property," and thus defines it: "And that is, when a person, in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, under which have been included bonds and bills drawn by the deceased upon his banker, to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor; yet it shall not
263 prevail against creditors, and is accompanied with this implied trust, that if the donor lives the property thereof shall revert to himself, being only given in contemplation of death or *causa mortis*. This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession, and so far differs from a testamentary disposition, but seems to have been handed to us from the civil lawyers, who themselves borrowed it from the Greeks." Hammond's Blackstone Bl., p. 771. In Tate *v.* Hilbert, 2 Vesey, Jr., 111, Lord Loughborough, in 1793, discusses the delivery essential to sustain a *donatio mortis causa*, and disapproves of the definitions of Swinburne, heretofore referred to. He treats them as only references to different texts of the civil law, and says that Swinburne, in his definitions, "is coupling the description of a legacy with a very short text of the civil law, and there is a perplexity in it." He further says that the first two definitions, the second of which the appellant in this case relies upon, are clearly mere donations. He then discusses the books of Justinian and says that Swinburne ought to have looked a little further and he would have found a history by Justinian of the contests upon the subject of gifts. The exact text from Justinian from which Professor Hammond has worked his translation as given above is quoted in full by Lord Loughborough, who thus approves: "There it is clearly and correctly defined that it had in effect the nature of a legacy, was liable to debts, and that it was only a gift upon survivorship, and the danger of suffering these gifts to be taken loosely occasioned, at the same time with the passage I have read, an ordinance by the emperor that it should be in writing with five witnesses." He then refers to Ward *v.* Turner, and concurs with the reasoning that there must be some delivery of the property. We cite this case, having had access to the same and studied it with much care, to demonstrate that that portion of Swinburne's definition upon which the appellant relies has not met with approval by the most learned judges in England since Swinburne wrote. Lowell, in his comments and annotations to Swinburne's text, also says the two first instances are simple gifts; the latter only applies to the *donatio causa mortis*, and is better described or defined in lege 27, and in Justin. Inst., tit. *De Donationibus*. See note to Powell's Swinburne on Wills, p. 54, part 1. Roper on Legacies approves of the criticisms of Swinburne by Loughborough in Tate *v.* Hilbert, and unequivocally states in his text that "it appears, upon consideration of the before-mentioned definitions (Swinburne's), that the third alone is the proper *donatio mortis causa*, the other two being nothing than pure irrevocable gifts *inter vivos*." Roper on Legacies, vol. 1, chapter 11. Other English writers have followed Justinian's definition, with the

qualification recognized by Lord Hardwicke in Ward *v.* Turner, that a delivery was essential. Spence on Equitable Jurisdiction, in 1846, called a *donatio causa mortis* a disposition of property "when a person in sickness, apprehending his dissolution near, delivers or causes to be delivered any personal goods or chattels to another, or puts the physical means of dominion over them into his power to keep for himself or for some one else in case of the donor's decease. In the event of the donor recovering, the property reverts to him. If the donor die the property belongs to the donee without the assent of the executor, though not as against creditors." 1 Spence's Eq. Jur., p. 196. Williams on Executors (page 887, c. 2, sec. 4) briefly summarizes the attributes of a *donatio mortis causa* as follows:
264 "First, the gift must be with a view to the donor's death; second, it must be conditioned to take effect only on the death of the donor by his existing disorder: third, there must be a delivery of the subject of the donation."

In America commentators, in their definitions, have followed in the line of the mother country. Kent says that such gifts are conditional, like legacies, and it is essential to them that the donor make them in his last illness or in contemplation and in expectation of death, and that there must be —. A gift *inter vivos* was irrevocable; but a gift *causa mortis* was conditional and revocable. 2 Kent Comm., p. 444. Judge Storys says such a gift is properly "a gift of personal property by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor shall die, but not otherwise. To give it effect there must be a delivery of it by the donor, and it is subject to be defeated by his subsequent personal revocation or by his recovery or escape from the impending peril of death. If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his lifetime, and therefore in no sense is it a testamentary act." Story's Eq. Jur., sec. 606. The supreme court of Connecticut, many years ago, defined these gifts as follows: "That species of donation is derived wholly from the civil law, and is where a person, in his last sickness, apprehending his dissolution near, delivers to another personal property, under which have been included bonds payable to the donor and bank bills, to keep in case of the donor's death. Three requisites are necessary to constitute a gift of this sort: (1) It must be made by the donor in contemplation of the conceived approach of death; (2) it must be given to take effect only in case the donor dies; (3) and there must be a delivery of the subject of donation. It is essential that the condition of its not passing while the donor lives be included; otherwise it will be a donation of another kind, namely, a *donatio inter vivos*. It differs from the latter in several respects, in which it resembles a legacy. It is ambulatory, incomplete, and revocable during the donor's life. The revocation may be effected either by the recovery of the donor from his disorder or by taking back the possession of the property. It can be made to the wife of the donor. On the other hand, it differs from a legacy in several particulars. The claim need not be proved in a court of probate. The title of the donee becomes, by

relation, complete and absolute from the time of the delivery. No consent or other act on the part of the executor or administrator is necessary to perfect the title of the donee. It is a claim against the executor. A legacy is a claim from the executor." Raymond *v.* Sellick and others, 10 Conn., 484.

Without reviewing in detail the definitions of many more American writers, we find that the general requirements as laid down by Williams on Executors succinctly state the law. Of modern American commentators, certainly none are more perspicuous or intelligible in their definitions than Pomeroy, who sums up the discussion in the following words: "A gift absolute in form, made by the donor in anticipation of his speedy death and intended to take effect and operate as a transfer of the title upon, and only upon, the
265 happening of the donor's death. Between the time when the gift is made and the article donated is delivered and the time when the donor dies the donation is wholly inchoate and conditional. The property remains in the donor, awaiting the time of his death, and passes to the donee when the death, in anticipation of which the gift was made, happens, unless the donation has in the meantime been revoked by the donor. The donee thus becomes a trustee for the donor, with respect to the article delivered into his possession, until the gift is made perfect by the donor's death. The gift must be absolute, with the exception of the condition inherent in its nature, depending upon the donor's death, as above described, and a delivery of the article donated is a necessary element; but it is subject to revocation by the act of the donor prior to death and is completely revoked by the donor's recovery from the sickness or escape from the danger in view of which it was made." 3 Pom. Eq. Jur. (2d ed.), sec. 1146; see also 2 Beach Mod. Eq. Jur., sec. 1061; Grymes *v.* Home, 49 N. Y., 21; Michener *v.* Dole, 23 Pa. St., 63; Story's Eq. Jur., pp. 599, 604; 2 Schouler, Per. Prop., sec. 135, 138; Thornt., Gifts, sec. 21; Croswell's & Adm'rs, sec. 620. In Basket *v.* Hassell, 107 U. S., 602, 2 Sup. Ct., 415, relied upon by the appellant, it was said "that a *donatio causa mortis* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent—that is, upon actual revocation by the donor or the donor's surviving the apprehended peril or outliving the donee," etc. "On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition," etc.

Reverting to the appellant's theory of the evidence in this case, if this definition of Justice Matthews was meant to exactly conform with Swinburne's second definition and rejects all gifts where a donor, with intent to make a gift *causa mortis*, delivers the property and surrenders the possession and control of the subject-matter of the gift with a statement, such as the donor used in this case, to the effect that if he died he wanted the donee to have the property delivered, then there has been a contraction of the generally accepted common-law rule that a gift *causa mortis* could be made by present

delivery, yet conditioned upon the death of the donor; but it was not so decided upon the facts of that case, and we doubt whether the definition quoted conflicts with Pomeroy's when the words used are measured by their strict applicability to the whole subject and its nature under consideration and the inherent qualifications inseparably attached to all gifts *causa mortis*. We believe we are
266 accurate in this last comment upon the opinion of Justice Matthews. We have examined the particular case upon which the reasoning of that opinion is laid, a decision of the supreme court of Tennessee made in 1867—Gass *v.* Simpson, 4 Cold., 288. The Tennessee case was this: The decedent was obliged to leave Tennessee to avoid the operations of the rebel conscription laws, and went to Kentucky, where he died, at Louisville, in 1863. Before leaving Tennessee, in 1862, he placed in the hands of Mary Simpson some gold and paper money, together with notes, receipts, etc., and stated to her at the time "if he never returned he wanted it all to be given to her son, George M. Simpson," who was at that time a minor, and on the day he left he stated to others that if he never returned he wanted "little George" to have what he had left in respondent's hands. The defendants contended that the facts constituted a valid *donatio causa mortis* of all the effects and money. The court, by Justice Hawkins, after taking up the definition of Swinburne, speaks of the contest which arose at an early day as to the real nature of gifts *causa mortis* and expressly recognized that a gift *causa mortis* is a conditional gift, dependent upon the contingency of expected death, which need not be expressed or specified by the donor; and after applying this principle to the facts in the case it was held that a valid donation *causa mortis* existed in favor of George Simpson. A part of this discussion of the supreme court of Tennessee is quoted verbatim by Justice Matthews as the foundation for his subsequent deductions. After taking up another part of the opinion, to the effect that delivery was essential, he says that a view of the entire passage leaves no room to doubt its meaning, that a *donatio causa mortis* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent—that is, upon actual revocation by the donor or by the donor's surviving the apprehended peril or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *causa mortis* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will." A close scrutiny of Justice Matthews' deductions would seem, therefore, to demonstrate that he did not mean to disaffirm the general doctrine as it was enunciated by the supreme court of Tennessee. Indeed, he expressly affirms their meaning. But if the appellant is correct in this case in his interpretation of the definition of Justice Matthews, that distinguished jurist has laid down a rule which if it had been applied to the very case whence it was deduced

could not have coincided with the principles announced therein or with the conclusion reached by the Tennessee court. We therefore cannot believe that the United States Supreme Court intended to say that a gift made in apprehension of death, and where the donor delivered the property to the donee with an expression to the effect that the property was to belong to the donee if he (the donor) should die, could not be sustained. The leading English cases and the civil law are not very exhaustively examined in the opinion of Justice Matthews. He seems to
267 have founded his opinion as to what delivery would sustain the gift largely upon the summarized law of the Tennessee case; but by his elaboration of the doctrine of the Tennessee case, although he affirmed the law thereof, nevertheless he has apparently laid down a doctrine often invoked and interpreted to defeat gifts *causa mortis*, where exactly such conditions were expressed by the donor as the appellant contends were imposed by Judge Davis in this case, and which would appear under the weight of authority, including the Tennessee decision, to but merely express the condition which is annexed by law to every donation *causa mortis;* for no matter whether the gift is made upon death or non-revocation as a condition precedent or subsequent, upon either condition an absolute and indefeasible title comes to the donee only upon the donor's death. A gift must be absolute in form by the donor while living. It cannot be absolute in fact until his death. The supreme court of Arkansas, in Hancher *v.* Buford (1895), 27 L. R. A., 507, refers to Basket *v.* Hassell upon this point and declined to follow the usually accepted interpretation of it. Its apparent doctrine is also ably discussed in Travis on Sales, where the author speaks of the "mistake" made by the supreme court. Travis on Sales, p. 6 *et seq.*

But, however interesting it might be to enter upon a comparison of the various decisions to determine whether the appellant's interpretation of Basket *v.* Hassell is correct or not upon the question of delivery, and to consider the divergencies of opinion, we refrain from so doing because, under our view of the facts of this case, the gift herein was delivered within the rule of the letter of the definition of that case, as appellant would apply it. The facts of the case at bar so clearly demonstrate that the delivery of the certificates was made by Judge Davis in contemplation of speedy death from his disease that it is unnecessary to dwell on that feature of the case. The prolonged and dangerous illness of the donor, his age, and the circumstances of the delivery fully show the expectation of Judge Davis to die shortly from the ailment from which he was then suffering. His trip to Puget sound was but a desperate fight for life, or to prolong the life which he felt he must soon lose. The argument that he apprehended death from a railway accident, as said before, is not well founded, in our judgement; but, if it were, it could not avail appellant, because the decedent also apprehended death from his disease, and inasmuch as he failed in health and died soon of such ap-rehended disease, which was the particular cause of death, with especial reference to which the delivery was

made, it matters not that he may also have feared death from other and insufficient causes. "The rule is that the donor must not recover from the disease from which he then apprehended death. If he recovers, the gift is void; if he does not recover, and the gift is not revoked, it becomes effectual." Ridden *v.* Thrall, 125 N. Y., 572; Gourley *v.* Linsenbigler, 51 Pa. St., 345; 56 Pa. St., 166; Craig *v.* Kittredge, 46 N. H., 57; Thornton on Gifts, sec. 23 *et seq.*; Williams *v.* Guile, 117 N. Y., 343.

Next, as to the important question of the effect of the delivery of the certificates of stock. We start with a delivery and acceptance of the certificates at the time of the delivery and the intention on Judge Davis' part to make a complete gift. But we have this
268 question: The subject of the gift was bank stock, shares in a national bank claimed by Andy upon a delivery as a gift or the certificates thereof, without indorsement or assignment in writing and without transfer on the books of the company. Can national bank stock be so transferred, and thus be made the subject of a valid gift *causa mortis?* The appellant asks a negative reply, and in an argument displaying great research and learning bases his request upon the common law and cases construed by him to be within the reasoning of the English adjudications, and here again is a divergency of opinion between learned writers. Some years back the common law of England, so far as the same was applicable and of a general nature and not in conflict with special enactments of the Territory, was declared to be the law, and was to be considered of full force; but to determine what the common law is are we to disregard the expositions by judicial authorities of our own country upon the common law? Clearly not. "No one," said Justice McLean in Wheaton *v.* Peters, 8 Pet., 659, "will contend that the common law as it existed in England has ever been in force in all its provisions in any State in this Union. It was adopted so far only as its principles were suited to the condition of the colonies, and from this circumstance we see what is common law in one State is not so considered in another. The judicial decisions, the usages and customs of the respective States, must determine how far the common law has been introduced and sanctioned in each."

Upon this question we quote from Chief Justice Shaw in Com. *v.* York, 9 Met., 93, who thus wrote of the adoption of the rules and principles of the common law of England in their applicability to our conditions: "As this is an unwritten law, we must seek for the evidence of it in judicial records, precedents, and decisions and those digests, treatises, and commentaries of learned and experienced men which have acquired respect and confidence by long usage and general consent. If we consult English decisions made since the Revolution, it is not because they have any binding force as rules, but because they are expositions of the rules and principles of the common law by men of great experience and judgment in the knowledge and application of the same laws which we are seeking to expound, and if we read the digests and treatises of reputable authors published since we ceased to be English subjects, it is because they contain the authentic records of the precedents and judicial pro-

ceedings which furnish the evidence of the common law. In like manner the decisions of courts of other States having the same common origin and deriving their laws from the same common source are valuable and useful in enabling us the more clearly to understand and the more fitly to apply the rules and principles of our own authoritative code of laws." The appellant relies at once upon Lord Hardwicke's opinion in Ward *v.* Turner. Although some cases and writers do not regard that case as positively deciding that choses in action, such as stocks, cannot be effectually delivered as a gift *causa mortis* without transfer of the legal property, yet it is generally cited to that holding. The property there delivered was receipts for South Sea annuities. We quote in part from
269 the chancellor's opinion: "Nor does it appear to me by proof that possession of these three receipts continued with Mosely from the time they were given, in February, to the time of Fly's death, for there is a witness who speaks that in some short time before his death Fly showed him these receipts and said he intended them for his uncle Mosely. Therefore I am of opinion that it would be most dangerous to allow this donation *mortis causa* from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance, and if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action, because stocks and annuities are capable of a transfer of the legal property by act of Parliament, which might be done easily, and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely. Consequently this is merely legatory, and amounts to a nuncupative will and contrary to the statute of frauds, and will introduce a greater breach on that law than was ever yet made, for if you take away the necessity of delivery of the thing given, it remains merely nuncupative." Ward *v.* Turner, 1 White & T. Lead. Cas. Eq., 1217.

After the decision of Ward *v.* Turner, throughout the various cases we find distinctions as to the extent to which Lord Hardwicke meant to go concerning the delivery of choses in action. There is a review of the history of these decisions in 1 Rop. Leg., pp. 10, 11, *et seq.*; but in 1827 Lord Eldon, under whose judgments have been recognized the expansion- of those principles of equity which were matured in the time of Lord Hardwicke, cleared up much of the doubt which had existed before his time, and advanced to the point of construction upon which has been, to a great degree, founded the further expansions of our American courts. Duffield *v.* Elwes, 1 Sim. & Stu., 243, was an action where the defendant was possessed of a bond for a certain sum of money, and had also a mortgage created by a deed of even date with the bond to secure the sum mentioned in the bond, and he had another mortgage for a large sum. The second mortgage was dated November 3, 1820. It recited that £30,000 had been advanced upon mortgage by Sir Sandys to the prior mortgagees and further secured by a bond and a judgment recovered, and that the mortgagees had called in the money. It was witnessed, in consideration of the £30,000 advanced by Elwes to Sandys to pay off the mortgage, that the money and judgment

were assigned and certain premises were also conveyed by mortgage from Sandys to Elwes to secure the £30,000. Elwes, when on his deathbed and unable to write, declared that he gave the bond and mortgage and the money secured by them to his daughter, Mrs. Duffield. At the desire of Elwes they were delivered into the hands of Mrs. Duffield. The vice-chancellor decided that the gift was not complete, because the delivery was not complete as a gift *inter vivos;* but, in the House of Lords, Lord Eldon, after citing the authorities, observed: "Lord Hardwicke is clearly of opinion that the delivery of a bond as a specialty would do, and if, then, the debt is well given by the delivery of the bond, the next question is what are we to do with the other securities which are, or not, delivered over? In the present case the bond, the assignment, the covenant, and all the deeds are delivered over in such a manner that the repre-
270 sentatives of the donor could not get at them, and the question is, whether, considering the difference between an absolute estate in land and a mortgage, the same principle does not apply in the case of a mortgage as in the case of a bond. Upon the whole, then, I am of opinion that the delivery of these securities is a good *donatio mortis causa*, as raising a trust by operation of law, and that, as so raising a trust by operation of law, they are not within the provisions of the statute of frauds." Rop. Leg., p. 19.

This celebrated case of Duffield *v.* Elwes is regarded as the turning point in the English law of property susceptible of delivery, and Lord Hardwicke's distinction between "the delivery of property and the delivery of its evidence has assuredly lost its point." 2 Schouler, Pers. Prop., p. 115, v. 2. Hewitt *v.* Kaye (1868), L. R., v. 6, recognizes the principle that "when a man on his deathbed gives to another an instrument, such as a bond or promissory note or an I. O. U., he gives a chose in action, and the delivery of the instrument confers upon the donee all the rights to the chose in action arising out of the instrument." The court approved of the doctrine laid down in Amis *v.* Witt, 33 Beav., 619.

The last English case that we have been able to find is Robson *v.* Hamilton (1891), L. R., C. D.; vol. 11, 559. Joseph Robson bequeathed and gave to his nephew Joseph Robson his old mahogany desk, "with the contents thereof," and made other disposition of his other property. The desk was found to contain notes, bankers' deposit receipts, and unindorsed checks to the order of the testator. The court sustained the gift of the desk with its contents, except the key to a tin box, and adverted upon the disadvantage to men in making bequests of that kind, and then said: "But in this case, as I have said, I think that the words the testator has used are strong enough, and, properly construed, ought to be held to include all the choses in action. The choses in action, if any distinction is to be taken, are such as could have been given by the testator by mere delivery as a *donatio mortis causa*. In that case the indorsement of the executors would be required, and in this case the indorsement of the executors will also be required." This last expression from the court of appeals of England is evidence of the development of the law in that country upon the subject of gifts *causa*

mortis. It is only cited as an instance of the growth of the doctrine permitting gifts of choses in action.

Chancellor Kent, about the same time that Lord Eldon decided Elwes *v.* Duffield, wrote that the distinction made by Lord Hardwicke between bonds and bills of exchange, promissory notes, and other choses in action "seems now to be exploded in this country, and they are all considered proper subjects of a valid donation *causa mortis* as well as *inter vivos*." 2 Kent Comm., 448. One of the earliest explosions was in Wells *v.* Tucker, 3 Bin. Penn., when, in 1811, it was decided that where a bond was delivered by the donor in his last illness to his wife for the use of a third person it was a good *donatio causa mortis*. See also 2 Barbour's Rights of Persons & Property, vol. 2, p. 632. Shaw, C. J., followed the doctrine of Kent in Parish *v.* Stone, 14 Pick., 198, and Sessions *v.* Mosely, 4 Cush., 87. The principle has also been recognized by English text-writers. Williams on Executors says bank notes may be the subject of a *donatio mortis causa*, because the property
271 is transferred by the delivery, and on the same principles all negotiable instruments which require nothing more than delivery to pass to the donee, the money secured by them may be the subjects of donations *mortis causa*. 1 Williams, Ex'rs, p. 829; Rop. Leg., p. 18, and cases cited. Story, when he wrote in 1835, doubted the soundness of the doctrine of Ward *v.* Turner, to the effect that a promissory note or bill of exchange not payable to bearer, or indorsed in blank, cannot take effect as a *donatio mortis causa*, inasmuch as no property therein could pass by the delivery of the instrument, and boldly said that the doctrine no longer prevails: that where a delivery will not execute a complete gift *inter vivos* it cannot create a *donatio mortis causa*, because it would not prevent the property from vesting in the executor, and as a court of equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator. On the contrary, the doctrine now established by the highest authority is that courts of equity do not consider the interest as completely vested in the donee, but treat the delivery of the instrument as creating a trust for the donee to be enforced in equity. Story, Eq. Jur., 604.

It being clear now that, under the progress of administration of principles of equity, gifts *causa mortis* may be made of incorporeal as well as corporeal chattels, and of choses in action generally, we must examine the class of property in this case, namely, national bank shares, and observe whether or not they are to be treated as upon any different plane from that occupied by shares of stock generally. As will be seen by the statement of the facts, the certificates delivered to Andy were issued in the donor's name, and each certificate contained the words "transferrable only by him or his attorney on the books of the bank on the surrender of this certificate." The by-laws of the bank also required a transfer on the books. The Revised Statutes of the United States (section 5139) provide as follows: "The capital stock of each association shall be divided into shares of one hundred dollars each and be deemed per-

sonal property, and transferred on the books of the association in such manner as may be prescribed by the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." No writing having passed at all between the parties, donor and donee, and no transfer on the books having been made, we must look at the principles and authorities bearing upon the direct point involved.

It was held in Slaymaker *v.* Bank, 10 Pa. St., 373, that shares of stock are, in commercial usages, regarded as choses in action, and the certificates are evidence of the title to the holder to them. Now, a chose in action is incorpo-eal and incapable of delivery, except by symbol. We grant that it is essential to the validity of a gift that it should be executed, but where the nature of the property given is incapable of manual delivery a delivery of the symbol which represents it is the only way to execute the gift. Things incorporeal, says Schouler in a learned review of gifts *causa mortis*, were not contemplated by the earlier English jurists at all, but when, in the commercial world, bills and notes acquired a standing before the courts, "delivery of the writing, with or without indorsement, became the rule of transfer." Equitable
272 assignments are now thoroughly recognized in the law, and, as a consequence, gifts that would have failed long ago in England because of imperfect delivery may be now upheld by the aid of a court of equity. 2 Schouler, sec. 72, *et seq.*; Thornt., Gifts, sec. 273, *et seq.* In Grover *v.* Grover (1837), 24 Pick., 261, it was decided a valid gift could be made *inter vivos* of a promissory note, payable to the order of the donor, without indorsement by him or other writing. The English cases referred to heretofore are cited in the opinion of the court and Lord Hardwicke's opinions referred to in the following language: "The leading case on this point is that of Miller *v.* Miller, 3 P. Wms., 356, in which it was held that the gift of a note, being a mere chose in action, could not take effect as a donation *mortis causa*, because no property therein could pass by delivery, and an action thereon must be sued in the name of the executor; but in Snellgrove *v.* Bailey, 3 Atk., 214, Lord Hardwicke decided that the gift and delivery over of a bond was good as a donation *mortis causa*, on the ground that an equitable assignment of the bond was sufficient. It seems to be very difficult to reconcile these two cases. The distinction suggested by Lord Hardwicke in the case of Ward *v.* Turner, 2 Ves. Sen., 431, in which he adheres to the decision in Snellgrove *v.* Bailey, is technical and, to my mind, unsatisfactory, and certainly has no application to our laws, which place bonds and other securities on the same footing. We cannot, therefore, adopt both decisions without manifest inconsistency, and we think, for the reasons already stated, that the decision in Snellgrove *v.* Bailey is supported by the better reasons and is more conformable to general principles and the modern decisions in respect to equitable assignments. We are, therefore, of the opinion that the gift of the note of hand in question is valid." In Camp's Appeal (1869), 36 Conn., 88, it was decided that choses in action the title to

which passes by delivery may be the subject of a gift, as well as any other species of property, and the court said: "Whatever may be said or thought of the propriety of the law, it is well settled by the modern authorities that choses in action not negotiable and negotiable paper not indorsed may be the subject of a gift, and that a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. In this respect a title by gift is not distinguishable from a title by purchase for a valuable consideration, and, when the claims of creditors do not interfere to affect its validity, such a title will be recognized and protected in the same manner and to the same extent as a title by sale." In Tillinhast *v.* Wheaton (R. I., 1867), 5 Am. Rep., 621, the delivery of a savings bank pass book containing entries by the officers of the bank of the amounts deposited by the deceased's wife, with a parol gift of the same by her husband on his deathbed, was a good gift *causa mortis* of the money deposited in the bank. The court there said that in the more recent English decisions the strictness of the ancient rule was relaxed, and the gift was sustained. The courts of Kentucky (Stevenson's Adm'r *v.* King, 50 S. A. R., 172) have recently followed the modern doctrine. A Mrs. Stevenson selected John King as her agent, and when she died King had in his possession a note and some county bonds, the bonds payable to bearer, and the
273 note indorsed in blank. On the day before Mrs. Stevenson died she told her mother that she gave her property to her, and she delivered a paper to her mother, telling her that this paper was to show the property she had at Louisville and to get her money on the paper. The paper was the letter from the agent, King, containing a statement of the property in his possession belonging to Mrs. Stevenson. The contention was, in part, in that case that in order to make such a gift of a note or a bond it must be delivered by passing manually from the possession of the one to the other; but the court held that the delivery required "must be according to the nature of the thing, and usually that means according to the physical nature of the thing to be delivered. * * * Now, will it be insisted, under the more modern authorities, that an actual delivery of the chose in action to the donee will not constitute a gift? We think not." The earlier cases are reviewed in this opinion, and the gift of the note and bonds was held to be good. In Hill *v.* Stevenson (1873), 63 Me., 364, a delivery to a donee of a savings-bank book, containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, was held to be a good delivery, as vesting an equitable title in the donee without assignment. See also Druke *v.* Heiken, 61 Cal., 346; Westerlo *v.* De Witt, 36 N. Y., 369; 3 Redf., Wills, p. 336.

Although some writers of recent date disapprove of the doctrine which sustains gifts *causa mortis* of stock in a bank by mere manual delivery of the certificate, yet there is a recognition that such gifts made are upheld where a complete equitable title vests in the donee, and where the evidence shows that it was plainly the intent of the donor to make the gift. This principle is recognized in Grover *v.* Grover,

heretofore cited; also in Bates' Adm'r *v.* Kempton, 7 Gray, 382, and in the following cases: Allerton *v.* Lang, 10 Bos., 362; Penfield *v.* Thayer, 2 E. D. Smith, 305; and, indeed, it was thought it was recognized by Lord Hardwicke himself in Snellgrove *v.* Bailey, criticised in Grover *v.* Grover. Pomeroy, after laying down the modern rule that all things in action "which consist of the promises or undertakings of third parties, not the donor himself, of which the legal or equitable title can pass by delivery, may be the subjects of a valid gift," says, in a note, "It is held in England that shares of stock are not capable of being the subject-matter of a valid donation, because no title can be transferred by delivery; no title can pass except by transfer on the company's own books. Under the law of this country, with respect to the title of the assignee before transfer is made in the company's books, there seems to be no reason why a certificate of stock may not be the subject of a valid gift, certainly if it has been indorsed in blank; but, in my opinion, such indorsement is not necessary." 3 Pom., Eq. Jur., sec. 1148; 1 Mor., Priv. Corp., sec. 197. In Grymes *v.* Hone, 49 N. Y., 17, the court sustained a gift *causa mortis* of bank stock where there was no delivery of the certificate and no transfer on the books, but an assignment in writing of the shares. It was held that delivery of the certificates without a transfer on the books of the bank would have made no more than an equitable title against the bank, but would have given a legal title as against the assignor, and that the representatives of the donor became trustees for the donee by operation of law to make the gift effectual.

274 In Walsh *v.* Sexton, 55 Barb., 251, a woman apprehending death gave some certificates of stock in a railroad to her husband. The certificates on their face were transferable only by her or her attorney on the books of the company on surrender of the certificates. There was no transfer, and no power of attorney was signed. The gift was sustained upon the authority of Westerlo *v.* De Witt, 36 N. Y., 345. This latter case of Westerlo *v.* De Witt (1867) is generally cited, and bears closely upon the case at bar. The donor, apprehending speedy death, told the plaintiff to bring her a roll of paper from the pocket of one of her dresses. She took the roll and gave it to plaintiff. There was in the roll a certificate of deposit for $1,500. After the gift the donee returned the parcel to the pocket of the dress, as directed by the donor before her death. The donor left a last will and testament in which she bequeathed to the plaintiff the legacy of a thousand dollars and the dress in which the parcel was placed. The plaintiff doubted whether the certificate was intended for her. She was advised that she could not recover it in law. There were other facts and circumstances not necessary to here recapitulate. The court of appeals, by Hunt, J., sustained the gift upon the ground that it was quite clear that in apprehension of death or among the living the gift of a mortgage or an indorsed note may be effected by a simple delivery of the security, and that Mrs. Clinton did not expect or intend to retain any control over the possession of the money or security after the date of the delivery. The security was placed upon the

same footing as the money, and both were held to be susceptible of being presented as a gift by delivery. "It is impossible," said the court, "to apply any rule which would make this a valid gift as to the money and invalid as to the certificate. They must stand or fall together." In Com. *v.* Crompton (1890), 137 Pa. St., 138, the donor there delivered a box containing a Government bond and certificates of railroad stock, with the intent to give the securities to the defendant. The court passed upon the direct question of whether the failure to make a formal written transfer would defeat the purpose of the donor. It was treated as well settled that a valid gift of non-negotiable securities may be made by delivery of them to the donee without assignment or indorsement in writing, and to sustain that proposition the court cite Wells *v.* Tucker, 3 Bin., 366, and Licey *v.* Licey, 7 Pa. St., 251: "The shares of stock are choses in action, and the certificates evidence of the title to them. Why may not a delivery of certificates, coupled with words of absolute and present gift, invest the donee with an equitable title to the stock, which the donor or a volunteer cannot successfully assail? A stockholder may clothe another with the complete equitable title to his stock without compliance with the forms printed by the corporation." In Cook *v.* Lum, 55 N. J. Law, 373, it is recognized that things in action may be given by a surrender to the donee of the donor's voucher of right or title, although the gift was in that case on the facts held invalid of right or title. So does Tiedeman on Equity Jurisprudence (section 359) uphold gifts of choses in action. So does Brantley on Personal Property, sec. 208, citing Pomeroy's opinion in his note. Lowell on Transfers (sections 43 and 109) lays down the rule that "a certificate is a muniment of title, and a delivery of the certificates, like a delivery of the title deeds in England, may be evidence of an intention to transfer the property they represent; and on the same principle the delivery of a certificate of stock may be a good *donatio causa mortis*, although no transfer of the stock is executed." Reed *v.* Copeland, 50 Conn., 472. Promissory notes, with or without indorsements, if delivered, may be good gifts *causa mortis*. Croswell on Ex., sec. 621; Vandor *v.* Roach, 73 Cal., 614, 354. The delivery of the certificates being intended as a gift of the stock, the donor did all that was required to pass an ownership, especially as there was no blank assignment on the back and no attorney present to draw one. The authorities above cited permit the circumstances surrounding the actors to be considered. Page *v.* Lewis (Va.), 18 L. R. A., 171.

The view that a delivery of the shares to Andy without writing or transfer on the book is good is also in direct harmony with Basket *v.* Haskell, *supra*, where it was regarded as unquestionable that a delivery of the certificate of deposit involved therein to the donee without an indorsement would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio causa mortis*. And we here observe that as the doctrine of this oft-referred-to case seems, upon appellant's theory, to contract the common-law definitions of the character of the conditions attached to a delivery, yet upon this

point, that choses in action may be given *causa mortis*, we find the same great tribunal that decided that case expanding the original English definitions so as to include not only choses in action generally, but those which by delivery concededly passed but an equitable title against all, except between the parties themselves. Thompson, in his Commentaries on Private Corporations, upholds a gift of stock by a delivery of the certificates, and cites Basket *v.* Hassell, *supra*, to sustain his text, and lays it down "that in conformity with this doctrine it has been often held that a valid gift of non-negotiable securities may be made by the delivery of them to the donee without an assignment or indorsement in writing. This principle has been applied to notes, bonds, stocks, certificates of deposit, and life-insurance policies. * * * So, also, it has been held that a valid gift, in view of death, of corporate stocks may be made by a simple delivery of the certificates with the intent to transfer the stocks, even though the certificates on their face are made 'transferable only by her or his attorney on surrender of this certificate,' though, as already seen, a gift of shares may be executed by a transfer on the books without a delivery of the certificate." Section 2390.

The argument that national bank shares stand upon a different footing is not tenable, for it was held in Johnston *v.* Laflin, 103 U. S., 800, that when a certificate of stock in a national bank was delivered (with a blank power of attorney indorsed as between the parties thereto) the title to the shares then passed; the right to the shares then vested in the purchaser. "The entry," said the court, "of the transaction on the books of the bank where stock is sold is required, not for the translation of the title, but for the protection of the parties dealing with the bank, and to enable it to know who are its stockholders entitled to vote at their meetings and receiving dividends when declared. * * * Purchasers and creditors, in the absence of other knowledge, are only bound to look to the
276 books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser or any one he may name to transfer it on the books of the company and the price is paid." And again: "The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies." In McNeil *v.* 10th Nat'l Bank, 46 N. Y., 325, the delivery of a certificate with the assignment and power indorsed was held to pass the entire title, legal and equitable, in the shares of a national bank, notwithstanding that by the terms of the charter or by-laws the stock was declared transferable only on its books. "Such by-laws," said the court, "do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens as the corporation may have upon it, and except the right of voting at elections," etc. Judge Thompson, in his usual clear & vigorous style, discusses the doctrine of distinguishing between the legal and equitable ownership of stock where the delivery of the certificate is had, and approves

that part of the opinion of Judge Rapallo in the case last cited, and concludes with the following observations of his own: "So the legal owner of shares in a corporation is the owner in whose name the shares stand on the books of the corporation, whereas the equitable owner is the one who, being the beneficiary—that is, the real owner—is not registered as such on the corporate books, and who must, if the corporation refuses so to register him, go into a court of equity to compel them to do so. The real meaning is that his title is complete as against everybody but the corporation itself, and those who have a superior right to have the corporation make the transfer to them." Thomp., Comm. on the Law of Corp., sec. 2393.

We are, therefore, of opinion that it was not indispensable to the validity of the transfer of the stock in question by our statutes or the law generally that there should have been any writing on the back thereof of the certificates, and that an equitable title passed to Andy. This equitable title gave Andy full right to the stock, and equity should afford him the means of obtaining possession of that incorporeal subject of gift, stock itself. The intent having existed in Judge Davis' mind to make the gift, and the stock certificates having been delivered, the legal title was complete as between Andy and his uncle, subject always, of course, to revocation or of the inherent conditions in gifts *causa mortis*. We need not consider the attitude of third parties or creditors, because none have appeared in this case. The donee, therefore, having an equitable title and a legal right, may enforce that right by the aid of equity. Many of the cases heretofore cited are where courts have extended their aid to give effect to gifts *causa mortis*. 1 Story, Eq. Jur., 607 *et seq.*

Passing to the point of dominion and control, the authorities hold, without much conflict, in recent decisions that the delivery of a chose in action as a gift must be such as to vest in the donee the equitable title and to divest the donor of all present control and dominion, always, of course, upon the recognized condition in cases of a gift *causa mortis*, and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms will not suffice. As we have seen, the intent of Judge Davis was complete in this case, and the delivery passed to the donee the equitable title.

277 Thus did the gift possess the all-important qualities of depriving the donor of all control and dominion over the property, and thus was the right conferred upon Andy to have compelled a transfer on the books of the bank of the stock to him. Under our view of the testimony of the words spoken by Judge Davis subsequent to the gift it is unnecessary to discuss whether or not there was any limitation or suspension of this right conferred upon Andy by the donor, although, as said, we doubt if there was other than the law implies in all gifts *causa mortis*. No writing was necessary, as said before, to perfect the delivery, and the omission of this ceremony does not lead to the conclusion that the transaction is invalidated on the ground that, by its omission, the donor was deprived of the control and dominion. The donor had parted,

and intended to part, with the muniments of title to the shares in the bank, and thus surrendered the certificates which were necessary to obtain a transfer on the books of the bank. Did Judge Davis, however, exercise any dominion and control after the date of the gift? The facts and circumstances, as apparent by the statement preceding this opinion, show that his nephew voted 950 shares of stock for the decedent for director at the regular stockholders' meeting, January 14, 1890. The holder of this proxy never conversed with Judge Davis regarding the same. It was given to the holder by Andy, and the facts all go to show that from the time Judge Davis executed the proxy, which antedated the gift some three days, he never was at the bank or took any part in its management or affairs. At the time of the meeting he was sick and away. Andy controlled the proxy entirely. It was necessary to hold the bank meeting, and to do this the stock in question had to be voted. As against the bank itself, the legal title to the stock was in Judge Davis, for by its books was it alone guided. Andy produced the proxy and inserted his brother's name, and at the direction of Andy, as said before, the stock was voted. We cannot see how this proxy can be made to defeat the donor's intent, as evidenced by the words and delivery and surrender of the certificates to Andy after the date of the proxy. Possibly, when the proxy was signed by Judge Davis, he had not made up his mind exactly what to do, or he might have contemplated postponing the execution of this gift; but it would be most unjust to hold that an act done under that proxy, without his knowledge or consent, should nullify all his acts and words sanely done just before he went to Tacoma, and, so far as Andy is concerned, he only did what any layman under such circumstances would have done—that is, assist to confer upon his dying uncle, during the rest of his life, the highest mark of affectionate regard then within his power to bestow. It has taken centuries for the most experienced and wise judges to determine that a donor of a gift *causa mortis* must divest himself at the time of the gift of all dominion and control of the article donated, and must place it wholly under the donee's power and enable him, without further act on his (the donor's) part, to reduce it to his own manual possession; yet it is strenuously urged by the appellant in this case that because Andy did this one single act, made necessary, within a few week's after his uncle's departure, it should be construed as so inconsistent with the surrender and control of the stock by his uncle and of his own right of dominion and control over the same as to deprive him of all his rights. It was the dominion of the
278 donee which controlled the voting of the shares. Every presumption is that the donee accepted such a gift, and we cannot believe for a moment that this conduct of Andy at that bank meeting ought to overcome that presumption, when considered in relation with the intent of his uncle and the delivery of the evidence of the shares to him.

We have not considered Judge Knowles' testimony at the various points throughout this opinion where it might have been pertinent to do so. This omission, however, was due to our desire to avoid

needless repetition, for we have regarded it in its application to the whole case. Without repeating it here, we find nothing in the interview between Judge Davis and Judge Knowles, about February 1st, which is not susceptible of reasonable interpretation favorable to Andy. Judge Knowles was not to return to see Judge Davis three days after his first visit with a view to make any testamentary disposition to Andy, for Judge Knowles expressly says that he was not to return "to fix up these gifts exactly," meaning thereby the gifts to Mrs. Wehrspaun's daughter, and the Butte library, and a lady, and two persons in the States. Judge Davis did not ask Judge Knowles about a will, and only referred to these particular gifts as gifts. He did say that Andy "is to control the bank or have the bank, or both," which language is surely not unfavorable to the respondent in this case, and indeed there is reason in the argument that Judge Davis knew that he had given the stock to Andy, and, by his words, that he meant to exclude it from his estate proper. In doing so he was but carrying out a statement he had made to that effect, long before, to many persons. That the testimony of these prior declarations was admissible is well sustained in reason and decision. Meyer's Appeal, 77 Pa. St., 486; Thornt., Gifts, sections 222, 234.

The length of this opinion prevents any more extended notices of the many cases cited by the appellant which have upheld contrary views of the law. Many of them turned upon the peculiar facts incident to the words of the gift; others are of a date when systems of commercial transactions between men were far less practical and convenient than in later years, while some adhere to the more ancient common-law doctrines, which refuse to recognize gifts *causa mortis* of shares until transfer is made on the books. The early Maryland decisions fully sustain appellant's position that a written transfer is necessary. Those cited to us, and others, are cited in Hinkley's Testamentary Law of Maryland (page 146 *et seq.*). The recent decisions of that State proceed upon *stare decisis*.

The court is asked to pass upon the "Federal question" involved in this case. To us it appears, however, that the main point involved is whether there has been a valid gift *causa mortis*. It being clear to us that the equitable title to the stock passed by the delivery of the certificates, no decision has been made upon that point other than by the common law generally, for we do not think the statutes of the United States attempt to regulate the transfer of such an equitable title; but if there is a Federal question involved, it is this: Can an interest in the shares of a national bank be legally transferred by the owner thereof to a donee, as a gift *causa mortis*, so as to confer the equitable title upon the donee, without a written transfer of the shares on the books of the bank or an indorsement on the back of the certificates themselves? We answer that
279 question affirmatively, in the light of the decisions of the Supreme Court of the United States, that a transfer on the books of a national bank is not necessary to give to a donee an equitable title to the shares. National Bank *v.* Watsontown Bank, 105 U. S., 220; Bank *v.* Lanier, 11 Wall., 378; Johnston *v.* Laflin,

103 U. S., 804; Black *v.* Zackarie, 3 How., 513. Judge Brewer, as circuit judge, held in Kansas *v.* Bradley, 26 Fed., 289, that a proposition once decided by the Supreme Court of the United States is no longer to be treated as a Federal question. Nor do questions which involve the ownership of national bank shares always present Federal questions. Williams *v.* Weaver, 100 U. S., 547; Le Sassier *v.* Kennedy, 123 U. S., 521.

We see no error in admitting the testimony of John E. Davis. The defendant had the burden of proof upon him, and, as the legal title stood in the name of the decedent, it was proper to show that respondent controlled and directed the voting of the stock, although it was voted and stood in the decedent's name. Having been rejected as a witness himself, he was obliged to produce some proof to explain who exercised dominion in fact and to rebut a presumption which might otherwise have arisen against him by the records of the bank meeting.

The testimony of Darnold, if entirely credible, would have rendered this case much simpler for discussion. We cannot tell what weight the district court gave to it. It is plausible and consistent in itself and may have impressed the court as truthful, but we have considered its value as impaired by the omission of Darnold to deny Boyce's affidavits by counter-affidavit. We regard Boyce's testimony on the trial as not weakening Darnold's statements. On the contrary, a reason for believing that Darnold told the truth is that Boyce failed to produce his books, which were at his house, he says, and thus to verify his statement that Darnold did not leave his (Boyce's) employ until some time after the alleged interview with Judge Davis, in 1890. It was to appellant's interest to impeach Darnold, and Boyce was called for that purpose. To know whether Darnold was in search of employment when he says he called upon Judge Davis was of the highest importance from the standpoint of impeachment, but upon that point appellant wholly failed, although Boyce said he had the evidence in his own possession. Moreover, if the affidavit of respondent Davis is true, Boyce was using Darnold's alleged statement of former perjury to coerce respondent into participation in a scheme to get money from the estate to pay Boyce's debts. Such a proposition, if it were really made, unfolds a brief chapter of moral obliquity on Boyce's part well calculated to shake the truth of his entire affidavit.

There is nothing whatsoever in the motion for a new trial to show that Darnold would testify differently from the way he did, even if we assume that what he said upon the preceding trial was false. The rule is not to grant a new trial to get impeaching testimony. A prosecution for perjury would be appropriate. Hopkraft *v.* Kittredge, 37 N. E., 768. The same evidence produced on this trial, if the testimony of Darnold were excluded, would be abundantly sufficient to sustain the conclusion reached by the district court, and courts will not grant new trials where it is apparent from the record that the result would probably be the same. U. S. *v.* Biena, 42 Pac., 70.

280 The findings made cover the issues involved in the pleadings and are supported by the evidence. Our conclusion is that this gift must be sustained. We believe in adhering to the rule that where a party claims by way of a donation *causa mortis* he should make out a strong case. It is therefore the duty of the court to give particular heed to every fact and circumstance in the testimony, being very careful to avoid any conclusion not fully sustained by credible evidence. On the other hand, there is a cardinal principle never to be lost sight of, namely, that the law permits a man to make gifts in apprehension of his death; and if he has done so in due manner, while in full possession of his senses and with deliberation and intent to bestow his personal property upon another, it would be a fearful injustice to nullify that intent and take away the property from the person justly entitled thereto. The more we have studied this case, the stronger has grown our conclusion that Judge Davis deliberately gave the bank stock to his nephew, and never by any word or deed signified any desire whatsoever to revoke the gift. We can find no middle line to follow in applying the rule of equity to the facts. Either the gift was perfected as between the Judge and Andy, and must be sustained, or the entire case of respondent Andy Davis is conceived in an iniquitous conspiracy with the appellant to enrich himself at the expense of his dead uncle's estate. If there were a conspiracy, the very foundation of it must needs lay in the premise that Judge Davis never handed over to the respondent any certificates of the shares at all before he went to Tacoma. But the premise that he did deliver the certificates is not assailed by any one throughout this case, and under the testimony could not be considered for a moment. So that when that assumed premise is removed the whole hypothesis of dishonesty falls with it and leaves standing by itself, as the correct reasoning and conclusion of the case, the gift of this fortune, which equity will uphold and enforce as prayed for by the respondents. The judgment is affirmed.

WILLIAM H. HUNT,
Associate Justice.

Pemberton, C. J., and De Witt, J., concur.

Per curiam: The record in this case was made up entirely with Talbott, as special administrator, as plaintiff, and the briefs so treat him. For that reason he has been called "plaintiff."

At the argument of the case, by consent of counsel, John H. Leyson was substituted as plaintiff, Leyson having been appointed as administrator since the appeal in this case was taken.

281 STATE OF MONTANA:

1895, thirty-second day of June term, Tuesday, September 24th, 1895.

Court convened pursuant to adjournment.
Present: Hon. Wm. Y. Pemberton, chief justice.
" Hon. Wm. H. Dewitt, associate justice.
" Hon. Wm. H. Hunt, associate justice.

JAMES A. TALBOTT, as Special Administrator of the Estate of Andrew J. Davis, Deceased, Appellant,
vs.
ANDREW J. DAVIS *et al.*, Respondents. } 702.

This cause having been set for hearing this day upon suggestion of appellant's counsel that Mr. John H. Leyson, administrator, with the will attached, had been substituted in place of James A. Talbott, special administrator herein—

It is ordered that the name of John H. Leyson, administrator, with the will attached, be entered of record as party plaintiff and appellant in place of said James A. Talbott, special administrator.

Thereupon the cause was argued to court by respective counsel and submitted for judgment and decision.

Whereupon court adjourned until 10 o'clock a. m., Sept. 25th, 1895.

WM. Y. PEMBERTON,
Chief Justice.
WM. H. DEWITT,
Associate Justice.
WM. H. HUNT,
Associate Justice.

282 Supreme Court, State of Montana, 1895, Twenty-fourth Day of October Term.

MONDAY, *November 25th*, 1895.

JOHN H. LEYSON, as Administrator of the Estate of Andrew J. Davis, Deceased, Substituted for James A. Talbott, as Special Administrator Thereof, Appellant,
vs.
ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, MONTANA, Respondents. } 702.

This cause this day came on for the judgment and decision of the court on appeal.

Whereupon, on consideration, it is now here ordered and adjudged that the judgment of the court below made and entered on the 25th day of May, A. D. 1894, and the order denying the motion for new trial made and entered on the 6th day of October, A. D. 1894, be, and the same are hereby, affirmed with costs.

Opinion by Hunt, associate justice; Pemberton, chief justice, and Dewitt, associate justice, concurring.

WM. Y. PEMBERTON,
Chief Justice.
WM. H. DEWITT,
Associate Justice.
WM. H. HUNT,
Associate Justice.

283 [Endorsed:] In the supreme court of the State of Montana. John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, plaintiff and appellant, against Andrew J. Davis, Jr., and The First National Bank of Butte, Montana, defendants and respondents. Certified copy of record. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court, State of Montana.

284 Supreme Court of the United States.

The petition of Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis, heirs, next of kin, and persons interested in the estate of Andrew J. Davis, deceased, late of Butte, Montana, for a writ of error to review a final judgment of the supreme court of the State of Montana, rendered November 25th, 1895, in a certain action entitled as follows:

JOHN H. LEYSON, as Administrator, with the Will Annexed, of the Estate of Andrew J. Davis, Deceased, Substituted in Place of James A. Talbott, Special Administrator of said Estate, Plaintiff,
vs.
ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, Defendants.

To the judges of the Supreme Court of the United States:

The petition of Henry A. Root, Sarah M. Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis respectfully shows to this court:

(1.) That John H. Leyson is administrator, with the will annexed, of the estate of Andrew J. Davis, deceased, late of Butte, Mon-
285 tana, and was appointed as such by the district court of the second judicial district of the State of Montana in and for the county of Silver Bow, and succeeded James A. Talbott, who, by said court, had been appointed special administrator of said estate.

(2.) That your petitioners Henry A. Root, Sarah M. Cummings, Ellen S. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis are heirs and next of kin of said Andrew J. Davis, deceased, and are persons interested in his estate and entitled to portions thereof, as will be hereinafter stated. Your petitioner Joshua G. Cornue is a husband of Ellen S. Cornue; that your petitioners are entitled to receive a large amount of the estate of Andrew J. Davis, deceased, as will be hereinafter shown; that it is the duty of the said John

H. Leyson, as such administrator, to take all necessary steps to secure property of said estate and to prosecute claims thereof; that among the assets of said estate is a claim to recover 950 shares of the First National Bank of Butte, Montana, representing and worth over one millions dollars ($1,000,000); that suit for this purpose was brought by the said James A. Talbott, as special administrator, against Andrew J. Davis, Jr., and the First National Bank of Butte, Montana, in which judgment was rendered against said administrator and in favor of the ownership of said stock in the defendant Andrew J. Davis, Jr., a nephew of said decedent; that on appeal from said judgment the same was affirmed by the supreme court of the State of Montana by judgment rendered November 25th, 1895;
286 that your petitioners are informed and believe that a Federal question is involved in said suit and they have requested John H. Leyson, as such administrator, to apply to this court for a writ of error to review said judgment, offering to indemnify him and said estate against all expense in case of an adverse decision, but the said John H. Leyson has refused to apply for said writ. Your petitioners herewith submit a duly certified copy of the record of said suit; that all of the matters herein stated in this paragraph will be more fully and at large set forth hereafter, and petitioners refer to said record in support of the allegations of this petition concerning proceedings had in said suit.

(3.) That the said Andrew J. Davis died in the city of Butte, Silver Bow county, Montana, on March 11th, 1890, leaving a large estate, both real and personal, then estimated at in excess of five million dollars ($5,000,000), and being the owner of said 950 shares of the stock of the said First National Bank of Butte; that he left surviving him the following as his only heirs-at-law and next of kin: Your petitioner Calvin P. Davis, a brother; Erwin Davis and John A. Davis, brothers; your petitioners Sarah Maria Cummings and Elizabeth S. Bowdoin, sisters; Harriet Wood and Diana Davis, sisters; Elizabeth S. Ladd, only surviving child of a deceased sister; Harriet R. Sheffield and Henry A. Davis, only surviving children of a deceased brother; your petitioners Henry A. Root and Ellen S. Cornue, only surviving children of a deceased sister; Mary Louise Dunbar and her sister, Elizabeth S. Smith, only surviving children of a deceased sister. All of such persons were and are over the age of twenty-one years.

(4.) That after the death of said Andrew J. Davis, deceased,
287 his brother, said John A. Davis, offered for probate in the district court of the second judicial district of the State of Montana a paper purporting to be a last will and testament of said deceased, a copy of which is hereto annexed and marked "Exhibit ;" that in and by said will all of the property of said deceased was devised and bequeathed to his said brother, John A. Davis, except a life maintenance therein given to certain persons named Thomas Jefferson Davis, Pet Davis and her mother, Miss Bergett, which interests are of little value and have been fixed by the court at only $15,000 as capitalized.

(5.) That contests were filed in said court to the probate of said

will by your petitioners Henry A. Root and Sarah Maria Cummings, and a separate contest by Harriet R. Sheffield and Henry A. Davis; that your petitioners Ellen S. Cornue and Joshua G. Cornue, her husband, were interested in said contest so filed by said Henry A. Root and Sarah Maria Cummings; that by reason of said contest James A. Talbott was appointed by said court special administrator of said estate; that the trial of said contest of your petitioners Henry A. Root and Sarah Maria Cummings was had in said court in the year 1891, but resulted in a disagreement of the jury.

(6.) That the said John A. Davis, the legatee named in said will, died on or about January 24th, 1893, intestate, leaving him surviving as his only heirs-at-law and next of kin a widow and certain children, namely, Thea Jane Davis, his widow, and his children,

Andrew J. Davis, Jr., John E. Davis, George W. Davis, Morris

288 A. Davis, Charles G. Davis, and Edward A. Davis; that on March 11th, 1893, the said John E. Davis was appointed administrator of the estate of the said John A. Davis, deceased, by said court and is now acting as such and was substituted by said court as proponent of said will.

(7.) That while said contests were so pending and prior to March 27th, 1895, the said contests of your petitioners, Henry A. Root and Sarah Maria Cummings, and of the said Harriet R. Sheffield and Henry A. Davis were settled and compromised by two certain conveyances, contracts, and agreements made by and between the said heirs and next of kin of John A. Davis, deceased, and the said Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, Joshua G. Cornue, Harriet R. Sheffield, and Henry A. Davis; that said John E. Davis, as administrator of John A. Davis, deceased, joined in said contracts; that pursuant thereto said contests and all of them were withdrawn in said court and said will, by decree of said court entered on March 27th, 1895, was duly admitted to probate, and that in and by said decree said parties to said contracts were adjudged to have certain and definite shares in kind in all of the property of said estate of Andrew J. Davis, deceased; that on or about said 27th day of March, 1895, the appointment of said James A. Talbott, special administrator as aforesaid, was revoked and the said John H. Leyson was duly appointed by said court administrator, with the will annexed, of said estate of Andrew J. Davis, deceased, and is now acting as such.

289 (8.) That within one year after the probate of said will, pursuant to the provisions of the laws of the State of Montana, contests for the purpose of revoking the probate of said will were duly filed in said court by the said Diana Davis, Harriet Wood, and Elizabeth A. Smith and by your petitioners, Elizabeth S. Bowdoin and Calvin P. Davis; that said contests of Diana Davis and Harriet Wood were dismissed in the year 1896; that Harriet Wood was interested in the contests of the said Elizabeth S. Bowdoin and the said Calvin P. Davis, and that while said last-mentioned contests were still pending and while the contest of the said Elizabeth A. Smith was still pending two certain further conveyances, contracts,

and agreements in settlement of said contests were made between the said heirs-at-law and next of kin of John A. Davis, deceased, and the said Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Joshua G. Cornue to and with the said Harriet Wood and the said Elizabeth A. Smith and to and with your petitioners, Elizabeth S. Bowdoin and Calvin P. Davis, to both of which contracts and conveyances the said John E. Davis, as administrator of John A. Davis, deceased, was a party; which contracts and agreements were made in settlement of said contests and gave to the said persons so contesting fixed and definite shares in kind in said estate; that said last-mentioned contracts were made in the year 1897.

(9.) That all of the said four contracts and conveyances so
290 made as aforesaid were, on application of the said John E. Davis, as administrator of the estate of John A. Davis, deceased, and by consent of all of the said heirs and next of kin of said John A. Davis, deceased, and of all of the other parties thereto, duly ratified and confirmed by said court by the decree made and entered therein on the 24th day of August, 1897; that thereafter and on said 24th day of August, 1897, pursuant to said contracts and conveyances and agreements, and by consent of all of the parties thereto, a decree was made, entered, and filed in said court duly fixing the rights and interests of all of the parties to said contracts in said estate of Andrew J. Davis, deceased, said shares being in the amounts hereinafter stated and duly confirming the probate of said will, and on said day all of the contests to revoke the probate of said will were withdrawn, and there are no contests now pending against the same, and the time to file any additional contests under the laws of Montana has long since expired.

(10.) That on August 26th, 1897, on application of all of the parties to said contracts, and of the said John E. Davis, as administrator of John A. Davis, deceased, a decree was rendered by said court fixing and determining the shares of the various persons interested in the estate of Andrew J. Davis, deceased, in manner and form as was fixed by said decree of August 24th, 1897, and that said decree of August 26th, 1897, further directed a partial distribution of said estate of Andrew J. Davis, deceased, to the persons and in the proportions as fixed by said decrees.

(11.) That in and by said decree confirming the probate of said will, entered August 24th, 1897, and in and by said decree of
291 partial distribution, entered August 26th, 1897, the rights of the persons interested in said estate of Andrew J. Davis, deceased, were fixed and adjudged to be as follows:

John E. Davis, as administrator of the estate of John A. Davis, deceased, two hundred eleven-hundredths ($\frac{200}{1100}$) of said estate in kind.

The said Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Joshua G. Cornue, two hundred and fifty eleven-hundredths ($\frac{250}{1100}$) of said estate in kind.

The said Harriet R. Sheffield and Henry A. Davis, forty-four eleven-hundredths ($\frac{44}{1100}$) of said estate in kind.

Your petitioner Elizabeth S. Bowdoin, fifty eleven-hundredths ($\frac{50}{1100}$) of said estate in kind.

Your petitioner Calvin P. Davis, fifty eleven-hundredths ($\frac{50}{1100}$) of said estate in kind.

The said Harriet Wood, fifty eleven-hundredths ($\frac{50}{1100}$) of said estate in kind.

The said Elizabeth A. Smith, twenty-five eleven-hundredths ($\frac{25}{1100}$) of said estate in kind.

Andrew J. Davis, Jr., and Charles H. Palmer, trustees, four hundred and thirty-one eleven-hundredths ($\frac{431}{1100}$) of said estate in kind.

All of said shares were subject to the legacies in said will contained to Thomas Jefferson Javis, Pet Davis, and Miss Bergett, except that the said Elizabeth A. Smith, Calvin P. Davis, and
292 Harriet Wood were not to be charged with any part of the bequest given to said Thomas Jefferson Davis, nor were they to share in any of the real estate owned by said Andrew J. Davis, deceased, in the State of Iowa.

(12.) That the amounts given in said decrees to the said Andrew J. Davis, Jr., and Charles H. Palmer, trustees, were so given to them pursuant to one of said contracts and agreements dated April 28th, 1893; that said trustees are to act as disbursing agents in paying certain expenses jointly incurred by the heirs-at-law and next of kin of John A. Davis, deceased, and the said John E. Davis, as such administrator, on the one part, and the said Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Joshua G. Cornue, on the other part; that after the payment of said expenses the property so given to said trustees is to be returned to said parties in the proportions fixed by said contract; that the real beneficial interests, therefore, of the persons interested in said estate are as follows:

John E. Davis, as administrator of John A. Davis, deceased... $\frac{731}{2200}$
The said Henry A. Root, Sarah Maria Cummings, Mary Louise Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Josua G. Cornue..... $\frac{1031}{2200}$
The said Harriet R. Sheffield and Henry A. Davis..... $\frac{88}{2200}$
Your petitioner Elizabeth S. Bowdoin..... $\frac{100}{2200}$
Your petitioner Calvin P. Davis..... $\frac{100}{2200}$
Harriet Wood..... $\frac{100}{2200}$
Elizabeth A. Smith..... $\frac{50}{2200}$

293 That your petitioners jointly represent and are entitled to more than one-third of said estate of Andrew J. Davis, deceased; that the said Mary Louise Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Harriet R. Sheffield, Henry A. Davis, Harriet Wood, and Elizabeth A. Smith are not opposed to the application for this writ, but are in favor of and desire the reversal of said judgment, and that they and your petitioners represent and are entitled to fourteen hundred and twenty-nine twenty-two hundredths ($\frac{1429}{2200}$) of said estate, nearly seven-elevenths ($\frac{7}{11}$) thereof; that the

said John E. Davis, as administrator of the estate of John A. Davis, deceased, representing interests of the heirs and next of kin of John A. Davis, deceased, is only entitled to seven hundred and thirty-one twenty-two hundredths ($\frac{731}{2200}$) of said estate, a little over three and one-half elevenths ($3\frac{1}{2}/11$) thereof.

(14.) That of the seven hundred and thirty-one twenty-two hundredths belonging to the heirs and next of kin of John A. Davis, deceased, one-third goes to the widow, Thea Jane Davis, under the laws of the State of Montana, and of the remaining two-thirds only one-sixth goes to Andrew J. Davis, Jr., one of the six sons of the said John A. Davis, deceased, so that his share of the estate of Andrew J. Davis, deceased, is only seven hundred and thirty-one nineteen thousand eight hundredths of said estate, or a little over three and one-half per cent. thereof.

(15.) That prior to the death of Andrew J. Davis, deceased, and at the time of his death, he was the owner of nine hundred and fifty shares of the First National Bank of Butte, Montana, a
294 national bank organized and existing under the laws of the United States, and at his death shares aggregating nine hundred and fifty in number stood upon the books of said bank in the name of said decedent; that said shares and the surplus and dividends of said bank belonging to them or which they represented were and are in excess of $1,000,000 in value.

(16.) That after the death of said decedent the said Andrew J. Davis, Jr., a nephew and one of the six sons of the said John A. Davis, deceased, claimed to be the owner of said shares by virtue of an alleged gift *causa mortis* from the said decedent, and he had possession of said shares, which he claimed a right to hold by reason of said alleged gift; that while the said James A. Talbott was special administrator of said estate, and on or about December 20th, 1893, he commenced an action in said court of the second judicial district of the State of Montana in and for the county of Silver Bow against the said Andrew J. Davis, Jr., and the said First National Bank of Butte to declare void the claim of the defendant Andrew J. Davis, Jr., to said stock, and to compel a delivery thereof to him, the said special administrator, and to compel the said bank to issue new certificates thereof to him; that the said defendants therein appeared and answered and the said plaintiff therein filed his reply to said answers, and the said defendant bank in its answer asserted a willingness to do in the premises whatever said court should decree, and the said defendant therein, Andrew J. Davis, Jr., in his answer asserted title to said stock and demanded an affirmative judgment that said court should decree the title thereof to
295 be in him and should compel the defendant bank therein to transfer said stock to him and to issue new certificates to him therefor.

(17.) That thereafter such proceedings were had in said suit after a trial upon certain evidence therein given that on or about May 25th, 1894, said court rendered its judgment therein, which adjudged that the said defendant therein, Andrew J. Davis, Jr., was the owner of said stock; that the said James A. Talbott, as such

special administrator, had no rights thereto and that the defendant bank therein should transfer on its books said stock to the said Andrew J. Davis, Jr., and should issue new stock to him in place thereof; that, among other things, it appeared in evidence upon the trial of said suit that said decedent, Andrew J. Davis, never endorsed or transferred said stock in writing to the defendant Andrew J. Davis, Jr., nor did he sign any power of attorney, blank or otherwise, authorizing any one to transfer said stock, nor was said stock ever transferred on the books of the said bank to the said Andrew J. Davis, Jr., and it appeared on said trial that the said decedent never gave to the said Andrew J. Davis, Jr., any oral or written authority to have said stock transferred on the books of said bank or otherwise to the said Andrew J. Davis, Jr.

(18.) That the title of the said Andrew J. Davis, Jr., to said stock was contested in said suit upon the ground that said certifi-
296 cates of stock contained the words "transferable only by him or his attorney on the books of the bank on the surrender of this certificate," and that in and by the Revised Statutes of the United States, among other things, section 5139, it was provided as follows:

"The capital stock of each association shall be divided into shares of $100 each and be deemed personal property and transferred on the books of the association in such manner as may be prescribed by the by-laws or articles of association. Every person becoming a shareholder by said transfer shall in proportion to his shares succeed to all the rights and liabilities of the prior holder of said shares."

And that it was provided in and by by-law number 21 of said bank as follows:

"The stock of this bank shall be assignable and transferable only on the books of this bank subject to the restrictions and provisions of the banking laws and transfer books shall be provided in which all assignments and transfers of stock shall be made."

And it was contended in said suit that, said bank being a national bank, no transfers of any stock thereof were valid except upon indorsement of certificates or upon the execution of a power of attorney to transfer the same and a transfer made upon the books of said bank as required by said statute and by the said by-laws of said bank.

(19.) That said court of the second judicial district of the State of Montana in and for the county of Silver Bow decided against the validity of the said defense and against the applicability of said statute of the United States thereto, and overruled said defense, and although the said plaintiff therein, James A. Talbott, as special administrator, claimed title and right to said stock under and by
297 virtue of the said statute of the United States, the said court decided against the said title and right so specifically set up and claimed by the said Talbott as special administrator therein under and by virtue of said statute, and said court by its decree decided in favor of the title of the said Andrew J. Davis, Jr., to said stock, notwithstanding the said statute of the United States; and thereafter said court overruled a motion made by the said James

A. Talbott, as special administrator, for a new trial of said action, which motion was made, among other things, upon the express ground that under said statute of the United States no valid transfer had ever been made or could be made of the said stock to the said defendant, Andrew J. Davis, Jr.

(20.) That thereafter the said James A. Talbott, as special administrator, appealed to the supreme court of the State of Montana, the highest court in said State in which a decision could be had, said appeal being taken from said decree of said lower court and from the order of said lower court overruling the said motion for a new trial, and the said supreme court of Montana thereafter, at the October term thereof, in the year 1895, and on November 25th, 1895, rendered its decision and final judgment, wherein said appellate court affirmed the judgment and order of said lower court and decided that said defense to the title of the defendant Andrew J. Davis, Jr., to said stock by reason of said statute was invalid, and that the title and right claimed by the plaintiff therein, James A. Talbott, as special administrator, to said stock by virtue of the provisions of said statute was invalid, and decided against the
298 right and title specially claimed and set up by the plaintiff, James A. Talbott, as special administrator, under and by virtue of said statute of the United States and adjudged the ownership of said stock to the said Andrew J. Davis, Jr., in spite of and notwithstanding said statute; and your petitioners aver that there could have been no decision of said action without passing upon said Federal question, and that said Federal question was necessarily involved in said case, and that the decision thereof was and is a conditioned precedent to any decision thereof.

(21.) That said suit so brought by the said James A. Talbott as special administrator was brought to recover assets of said estate, and was brought by him in the interest of all those ultimately entitled to share in a division of said estate, among whom are your petitioners.

(22.) That at the argument of said appeal in said supreme court of Montana the said court, by consent of counsel, made its order substituting as plaintiff in said suit the said John H. Leyson as administrator, with the will annexed, in place of the said James A. Talbott, special administrator, who had theretofore been superseded: that your petitioners have been advised by Robert G. Ingersoll and Walter S. Logan, their counsel, that a Federal question is involved in the decision of said action of which this court has jurisdiction, and your petitioners verily believe and allege that a Federal question has arisen in said suit, and that a defense was urged upon that ground to the said claim of the said Andrew J. Davis, Jr., namely,
299 the provisions of said statutes of the United States; and your petitioners aver that the said James A. Talbott, as special administrator in said suit, claimed title and right to said stock under and by virtue of the provisions of said statute of the United States, and that the decree of said court and the order of said court denying the motion for a new trial and the decision and judgment of said supreme court of Montana were each of them

rendered against said title and right so specifically set up and claimed by the said James A. Talbott, as plaintiff therein, under said statute of the United States.

(23.) That the said John H. Leyson, as administrator of Andrew J. Davis, deceased, as plaintiff in said action hereinbefore referred to, represented and represents your petitioners as well as all of the persons interested in the estate of Andrew J. Davis, deceased; that your petitioners, though not nominal parties to said record, are all beneficially interested in the result of said suit, and the said John H. Leyson, as such administrator, has no interest therein except as a representative of the beneficiaries entitled to share in said estate; that after the affirmance of said judgment by the supreme court of Montana the said John H. Leyson, as such administrator, was informed by his counsel who had appeared for him in said suit,
namely, E. Warren Toole and J. B. Clayberg, of Helena,
300 Montana, that in their opinion there was a Federal question
involved in said suit, and that it was his duty to apply for a writ of error from this court to review the said judgment of the supreme court of Montana; that the said John H. Leyson has never taken said advice or made any such application.

(24.) That your petitioners are informed and believe that their counsel, Robert G. Ingersoll and Walter S. Logan, on the 4th day of October, 1897, at the city of Boston, Massachusetts, requested the said John H. Leyson to take out said writ of error or to apply for the same, but that he absolutely refused so to do, stating, among other things, that it would be an expense to said estate; that the said counsel thereupon offered to indemnify the said John H. Leyson as such administrator and the said estate against all loss and damage in case of an adverse decision, acting on behalf of your petitioners, and offered on behalf of your petitioners to pay all expenses of said writ of error, but that the said John H. Leyson still refused absolutely to take out or apply for the same. Hereto annexed are the affidavits of Robert G. Ingersoll and Walter S. Logan upon which we base our information.

(25.) Your petitioners hereby offer and bind themselves, in case said writ of error is allowed, to indemnify said John H. Leyson as such administrator and the estate of Andrew J. Davis against all costs and expense in case of any adverse decision, and to pay all expenses of said writ of error of all kinds, and agree not to ask the payment of the same from said estate or for any costs or counsel fees
in the event that said writ of error shall not result in a re-
301 versal of said judgment of the supreme court of Montana;
and your petitioners aver that there is great danger that said stock of said bank will be wholly lost to said estate, and that your petitioners and those entitled to said estate will be wholly without remedy unless this honorable court shall grant leave to your petitioners to prosecute said writ of error; that said judgment of the supreme court of Montana was rendered upon the 26th day of November, 1895, and the time is very short in which to apply for and secure a writ of error and file it in the court below; that your petitioners have been unable to apply for this writ sooner because thei

status as beneficiaries and persons entitled to shares in the estate of Andrew J. Davis, deceased, was not finally fixed and determined by the courts of Montana until August, 1897.

Wherefore your petitioners pray this honorable court or a justice thereof that a writ of error issue out of and under the seal of this honorable court, directed to the supreme court of the State of Montana, to bring up the said record of said suit hereinbefore described, and that the same be allowed, and that your petitioners be granted leave to prosecute said writ in the name of the said John H. Leyson, as administrator, with the will annexed, of the estate of Andrew J. Davis, deceased, plaintiff in said suit, for and on behalf of said estate and for and on behalf of themselves and all other persons interested therein; and your petitioners pray for such other and further relief as may be just and equitable.

And your petitioners will ever pray, &c.

HENRY A. ROOT, *Petitioner.*

R. G. INGERSOLL,
WALTER S. LOGAN,
Of Counsel for Petitioners.

302 DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Henry A. Root, being duly sworn, says that he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY A. ROOT.

Sworn to before me this 28th day of October, 1897.

ALBERT W. SIOUSSA,
Notary Public, D. C. [L. S.]

303 Supreme Court of the United States.

The petition of Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis, heirs, next of kin, and persons interested in the estate of Andrew J. Davis, deceased, late of Butte, Montana, for a writ of error to review a final judgment of the supreme court of the State of Montana, rendered November 25th, 1895, in a certain action entitled as follows:

JOHN H. LEYSON, as Administrator, with the Will Annexed, of the Estate of Andrew J. Davis, Deceased, Substituted in Place of James A. Talbott, Special Administrator of said Estate, Plaintiff,

vs.

ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, Defendants.

STATE OF NEW YORK,
County of New York, Southern District of New York, } ss:

Robert G. Ingersoll, being duly sworn, deposes and says: Walter S. Logan and I are counsel for the petitioners in the above-entitled proceeding upon this application to procure a writ of error mentioned in the annexed petition.

We are both acquainted with John H. Leyson, administra-
304 tor, with the will annexed, of the estate of Andrew J. Davis, deceased. On the 4th day of October, 1897, we met the said John H. Leyson at the Adams house, in the city of Boston, in the afternoon of said day. We stated to him that we represented the persons who are the petitioners in the annexed petition, and that they jointly were the owners of and interested in more than one-third of the estate of Andrew J. Davis, deceased. We requested him, on behalf of said petitioners and clients, to apply for a writ of error to review the judgment of the supreme court of Montana mentioned in the annexed petition, and both expressed it as our opinion that there was a Federal question involved which had been erroneously decided, which was necessarily involved, and that a reversal of the judgment could be obtained. He stated that he would not take out the writ of error, giving as an excuse that it would be an expense to the estate, and that he thought the estate had had enough of litigation. We thereupon both stated to him that our clients would apply for the writ of error and would prosecute the same without expense to him or said estate in case said writ of error should not be successful. Notwithstanding this offer on our behalf, he still refused to take out said writ of error. We called his attention to the fact that E. Warren Toole and J. B. Clayberg, who had been his counsel in the court below, had both been consulted by him in regard to taking out said writ and had both advised that it was his duty so to do, and had both advised that, in their opinion, a Federal question was involved; to which he replied that he had looked into
305 the question himself, and that he had come to the conclusion that a writ of error would not prove effective and would not result in a reversal of the judgment of the supreme court of Montana. The said John H. Leyson is not a lawyer, but is engaged in the business of jeweler at the city of Butte, Montana.

R. G. INGERSOLL.

Sworn to before me this 27th day of October, 1897.

MYRA B. MARTIN,
[L. S.] *Notary Public*, 168, *City & County of New York.*

DISTRICT OF COLUMBIA, *ss*:

Walter S. Logan, being duly sworn, deposes and says: I have read the foregoing affidavit of Robert G. Ingersoll. It is true to my own knowledge.

WALTER S. LOGAN.

Subscribed and sworn to before me this 27th day of October, 1897.

[L. S.] ALBERT W. SIOUSSA,
Notary Public, D. C.

306 "EXHIBIT A."

"Know all men by these presents, that I, A. J. Davis, of the county of Van Buren, State of Iowa, being in good health, of sound and disposing mind and memory, do make and publish this my last will and testament, and as to my worldly estate, and all the property, real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath, and dispose thereof in the manner following, to wit:

My will is that I give and bequeath to Thomas Jefferson Davis and Pet Davis and her mother, Mrs. Bergett, all three of Van Buren county, Iowa, a lifetime maintenance; that is to say, they shall have the necessaries of life out of my estate during their natural life, this amount of annuity to be set apart by my executors hereafter named, and the judgment of my executors as to the amount necessary to be set apart for the support of the above-named persons shall be final. I give, devise and bequeath to my beloved brother, John A. Davis, the reversion or remainder of my property, whether real, personal or mixed, to have and to hold the same forever, together with all the profits and income thereof, to the said John A. Davis, his heirs, administrators, or assignees, to his and their use and benefit forever; and lastly I do nominate and appoint James Davis and Jobe Davis, of Davis county, in the State of Iowa, to be the executors of this my last will and testament.

In testimony whereof, I, the said A. J. Davis, have to this my last will and testament, contained on one sheet of paper, I have subscribed my name and affixed my seal this twentieth day of July, in the year of our Lord one thousand eight hundred and sixty-six (1866).

A. J. DAVIS.

Signed, sealed, published, and declared by the said A. J. Davis as and for his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

Witnessed:

J. C. SCONCE.
JAMES DAVIS.
JOB DAVIS."

307 [Endorsed:] Copy. Supreme Court of the United States. *In re* petition of Henry A. Root & others for writ of error to review judgment of supreme court in action entitled as follows: John H. Leyson, as administrator, etc., *vs.* Andrew J. Davis, Jr., etc. Petition for writ of error. Logan, Demond & Harby, att'ys for petitioners, 58 William street, New York. Robert G. Ingersoll, Walter S. Logan, of counsel. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court State of Montana.

308 Supreme Court of the United States.

In re petition of Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis, heirs, next of kin, and persons interested in the estate of Andrew J. Davis, deceased, late of Butte, Montana, for a writ of error to review a final judgment of the supreme court of the State of Montana, rendered November 25th, 1895, in a certain action entitled as follows:

JOHN H. LEYSON, as Administrator, with the Will Annexed, of the Estate of Andrew J. Davis, Deceased, Substituted in Place of James A. Talbott, Special Administrator of said Estate, Plaintiff,

against

ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, Defendants.

Upon reading the petition of Henry A. Root and others, praying for a writ of error to review the judgment of the supreme court of the State of Montana, rendered in the action above mentioned November 25th, 1895, and upon reading a certified copy of the record of said suit, and upon reading the assignment of errors and the bond for costs submitted therewith, and an additional bond indemnifying John H. Leyson, as administrator, with the will annexed, of the estate of Andrew J. Davis, deceased, the said plaintiff,
309 and the said estate against all costs, damages, and expenses of the prosecution of said writ of error in case the same should not prove successful, and due consideration having been had, it is hereby—

Ordered that a writ of error issue out of and under the seal of this court, in the name of said John H. Leyson, as such administrator, and on behalf of said petitioners, directed to said supreme court of Montana, to review and bring up the record of said suit in said court, and that a citation issue accordingly, the said writ being hereby allowed and the said bonds being hereby approved.

Dated Washington, October 29, 1897.

DAVID J. BREWER,
Justice Supreme Court of the United States.

310 [Endorsed:] Copy. Supreme Court of the United States. *In re* petition of Henry A. Root & others for writ of error to review judgment supreme court of Montana in action entitled as

follows: John H. Leyson, as administrator, etc., *vs.* Andrew J. Davis, Jr., etc. Order. Logan, Demond & Harby, att'ys for petitioners, 58 William street, New York. Robert G. Ingersoll, Walter S. Logan, of counsel. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court, State of Montana.

311 Supreme Court of the State of Montana.

JOHN H. LEYSON, as Administrator, with the Will Annexed, of Andrew J. Davis, Deceased, Plaintiff,
against
ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, Defendants.

Know all men by these presents that we, Robert G. Ingersoll, of 220 Madison avenue, city, county, and State of New York, and Walter S. Logan, of 206 West 72nd street, city, county, and State of New York, are held and firmly bound unto the above-named Andrew J. Davis, Jr., and the First National Bank of Butte in the sum of five hundred dollars ($500), to be paid to the said Andrew J. Davis, Jr., and the said First National Bank of Butte; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 27th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

312 Whereas on behalf of the plaintiff certain of the heirs, next of kin, and persons interested in the estate of Andrew J. Davis, deceased, namely, Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Montana, the said plaintiff, as such administrator, having refused to apply for said writ:

Now, therefore, the condition of this obligation is such that if the said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis shall prosecute on behalf of the plaintiff said writ of error to effect and answer all damages and costs if they shall fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ROB'T G. INGERSOLL. [L. S.]
WALTER S. LOGAN. [L. S.]

Approved Oct. 29, '97, as a bond for costs.

DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

313 COUNTY OF NEW YORK, } ss:
State of New York, Southern District of New York, }

On this 27th day of October, 1897, before me personally appeared the above-named Robert G. Ingersoll, to me personally known and known to me to be the individual described in and who executed the foregoing bond, and acknowledged to me that he executed the same for the uses and purposes therein set forth.

MYRA B. MARTIN,
[L. S.] *Notary Public*, 168, *City & County of New York.*

DISTRICT OF COLUMBIA, *ss:*

On this 27th day of October, 1897, before me personally appeared the above-named Walter S. Logan, to me personally known and known to me to be the individual described in and who executed the foregoing bond, and acknowledged to me that he executed the same for the uses and purposes therein set forth.

[L. S.] ALBERT W. SIOUSSA,
Notary Public, D. C.

314 DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Robert G. Ingersoll, being duly sworn, says: I reside at No. 220 Madison avenue, in the city of New York, State of New York. I am worth the sum of one thousand dollars ($1,000) over and above all my debts and liabilities and exclusive of property exempt from levy and sale under an execution.

R. G. INGERSOLL.

Sworn to before me this 28th day of October, 1897.

ALBERT W. SIOUSSA,
[L. S.] *Notary Public, D. C.*

DISTRICT OF COLUMBIA, *ss:*

Walter S. Logan, being duly sworn, says: I reside at No. 206 West 72nd street, in the city of New York, State of New York. I am worth the sum of one thousand dollars ($1,000) over and above all my debts and liabilities and exclusive of property exempt from levy and sale under an execution.

WALTER S. LOGAN.

Sworn to before me this 27th day of October, 1897.

[L. S.] ALBERT W. SIOUSSA,
Notary Public, D. C.

315 [Endorsed:] Copy. Supreme court of Montana. John H. Leyson, as administrator, etc., pl't'ff, against Andrew J. Davis, Jr., and The First Nat'l Bank of Butte, def'ts. Bond for costs. Logan, Demond & Harby, att'ys for petitioners, 58 William street, New York. Robert G. Ingersoll, Walter S. Logan, of counsel. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court, State of Montana.

316 Supreme Court of Montana.

JOHN H. LEYSON, as Administrator, with the Will Annexed, of the Estate of Andrew J. Davis, Deceased, Plaintiff,
against
ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, Defendants.

Know all men by these presents that we, Robert G. Ingersoll, of 220 Madison avenue, city, county, and State of New York, and Walter S. Logan, of 206 West 72nd street, city, county, and State of New York, are held and firmly bound unto the above-named John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, and to said estate of Andrew J. Davis, deceased, in the sum of five thousand dollars ($5,000), to be paid to the said John H. Leyson, as such administrator, or his successor in said trust, or to said estate; for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 27th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis, heirs and next of kin and persons interested in the estate of Andrew J. Davis, deceased, have applied to the Supreme Court of the United States for a writ of error to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Montana on behalf of the said John H. Leyson, as such administrator, he having refused to apply for the same, and said persons so applying have agreed to indemnify him and said estate
317 against all costs, damages, and expenses by reason of the prosecution of said writ if the same shall not be successful;

Now, the condition of this obligation is such that if the said Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis shall prosecute said writ of error without expense to the said John H. Leyson, as such administrator, or his successor or said estate, and shall hold him or them harmless from all costs, damages, and expenses by reason of the prosecution of said writ in case the same shall not be successful, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ROB'T G. INGERSOLL. [L. S.]
WALTER S. LOGAN. [L. S.]

Approved Oct. 29, '97.
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

318 COUNTY OF NEW YORK, } ss:
State of New York, Southern District of New York, }

On this 27th day of October, 1897, before me personally appeared the above-named Robert G. Ingersoll, to me personally known and

known to me to be the individual described in and who executed the foregoing bond, and acknowledged to me that he executed the same for the uses and purposes therein set forth.

[L. S.] MYRA B. MARTIN,
Notary Public, 168, *City & County of New York.*

DISTRICT OF COLUMBIA, *ss:*

On this 27th day of October, 1897, before me personally appeared the above-named Walter S. Logan, to me personally known and known to me to be the individual described in and who executed the foregoing bond, and acknowledged to me that he executed the same for the uses and purposes therein set forth.

[L. S.] ALBERT W. SIOUSSA,
Notary Public, D. C.

COUNTY OF NEW YORK,
State of New York, Southern District of New York, } *ss:*

Robert G. Ingersoll, being duly sworn, says: I reside at No. 220 Madison avenue, in the city of New York, State of New York. I am worth the sum of ten thousand dollars ($10,000) over and above all my debts and liabilities and exclusive of property exempt from levy and sale under an execution.

R. G. INGERSOLL.

Sworn to before me this 27th day of October, 1897.

[L. S.] MYRA B. MARTIN,
Notary Public, 168, *City & County of New York.*

319 DISTRICT OF COLUMBIA, *ss:*

Walter S. Logan, being duly sworn, says: I reside at No. 206 West 72nd street, in the city of New York, State of New York. I am worth the sum of ten thousand dollars ($10,000) over and above all my debts and liabilities and exclusive of property exempt from levy and sale under an execution.

WALTER S. LOGAN.

Sworn to before me this 27th day of October, 1897.

[L. S.] ALBERT W. SIOUSSA,
Notary Public, D. C.

320 [Endorsed:] Copy. Supreme court of the State of Montana. John H. Leyson, as administrator, etc., plaintiff, against Andrew J. Davis, Jr., and The First Nat'l Bank of Butte. Indemnity bond. Logan, Demond & Harby, att'ys for petitioners, 58 William street, New York. Robert G. Ingersoll, Walter S. Logan, of counsel. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court, State of Montana.

321 Supreme Court of Montana.

JOHN H. LEYSON, as Administrator, with the Will Annexed, of Andrew J. Davis, Deceased, Plaintiff,
vs.
ANDREW J. DAVIS, JR., and THE FIRST NATIONAL BANK OF BUTTE, Defendants.

Assignment of Errors.

The plaintiff, John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, pursuant to the rules and practice of the Supreme Court of the United States, hereby assigns the following errors committed in this cause, and says that in the record and proceedings herein there are manifest errors, in this, to wit:

I.

The district court for the second judicial district of the State of Montana in and for the county of Silver Bow refused to find, at plaintiff's request, that Andrew J. Davis, Jr., did not become a shareholder in the defendant bank by the alleged gift under the statutes of the United States and by-laws of the bank made in pursuance thereof, and also refused to find the further request "that said alleged donee did not succeed to the rights and liabilities of the deceased under said statutes and by-laws;" and refused to
322 find the further request "that said donor was not divested of his possession, dominion, and control of said stock under said statutes and by-laws or otherwise;" and refused the further request "that the legal title and control and dominion over said stock remaining in the alleged donor at the time of his death, the same vested in the plaintiff, as administrator, under the statutes of the United States, who now holds and possesses the same, and that said supreme court of Montana in affirming the judgment of said court affirmed said erroneous action on the part of said trial court, and that in so doing it committed error.

II.

That said trial court of Montana overruled and denied plaintiff's motion for judgment in said cause, which was made upon the following grounds:

1.

Because the evidence in said cause will not authorize a decree requiring an assignment of said certificates or a transfer of said stock to defendant Davis.

2.

Because, if the same is sufficient otherwise to authorize a transfer of said certificates of stock or to make said defendant, Davis, a shareholder in said bank, it is utterly insufficient under the statutes of the United States applicable thereto.

3.

Because — the laws of the United States applicable thereto
323 said defendant, Davis, has neither the legal title or beneficial interest in the shares of stock of said defendant, First National Bank of Butte, and because the plaintiff herein claimed the right thereto under said statutes.

4.

Because the rights of the plaintiff and defendant Andrew J. Davis, as well as to dates and obligations of defendant bank, arise under the laws of the United States.

5.

Because the manner of becoming and rights and liabilities of shareholders are involved, which are created by and arise under the laws of the United States, and must be determined by the interpretation thereof.

And that said supreme court of Montana in affirming the judgment of said trial court affirmed said erroneous action on the part of said trial court, which was error.

III.

That said supreme court of Montana in and by its judgment affirming the judgment of said trial court decided against the title claimed by plaintiff under the statutes and laws of the United States regulating national banks and, notwithstanding such statutes, decided in favor of the title claimed by the defendant Andrew J. Davis, Jr.

IV.

That in said trial court motion was made by plaintiff for a new trial, among other things, upon the grounds that under the
324 laws of the United States regulating national banks the title to the stock in controversy was in the plaintiff and not in the defendant Andrew J. Davis, Jr., but that said trial court decided against said claim and overruled said motion for a new trial, and that said supreme court of Montana erroneously affirmed said order.

V.

That said supreme court of Montana affirmed the judgment of the trial court in said cause and decided against the validity of the claim made by plaintiff under the statutes and laws of the United States regulating national banks, and particularly U. S. R. S., section 5139.

VI.

In that said supreme court of Montana did not reverse said judgment of said trial court and grant a new trial in said cause upon the ground that under the laws and statutes of the United States regu-

lating national banks the defendant Andrew J. Davis, Jr., acquired no title to the stock in controversy, and in that it did not decide that the title to said stock by virtue of said laws was in the plaintiff.

Wherefore the plaintiff prays that the judgment of the supreme court of the State of Montana in favor of the defendant Andrew J. Davis, Jr., and against the plaintiff be reversed.

Dated October 25th, 1897.

LOGAN, DEMOND & HARBY,
Attorneys Representing Plaintiff, 58 William Street, New York City.
ROBERT G. INGERSOLL,
WALTER S. LOGAN, *Of Counsel.*

325 [Endorsed:] Copy. Supreme court of Montana. John H. Leyson, as administrator, etc., plaintiff, against Andrew J. Davis, Jr., and The First National Bank of Butte, defendants. Assignment of errors. Logan, Demond & Harby, att'ys for petitioners, 58 William street, New York. Robert G. Ingersoll, Walter S. Logan, of counsel. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court, State of Montana.

326 UNITED STATES OF AMERICA, *ss:*

To Andrew J. Davis, Jr., and The First National Bank of Butte, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 29th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

327 [Endorsed:] Original. Supreme Court of the United States. John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff in error, against Andrew J. Davis, Jr., and The First National Bank of Butte, defendants in error. Citation. Robert G. Ingersoll, Walter S. Logan, Charles M. Demond, Henry A. Root, of counsel for plaintiff in error. Filed Nov. 15, 1897. Benj. Webster, clerk supreme court, State of Montana.

Due service of the foregoing citation admitted and receipt of copy acknowledged this 5th day of November, A. D. 1897.

W. W. DIXON,
JOHN F. FORBIS,
JAMES W. FORBIS,
Attorneys for Defendants in Error, Andrew J. Davis, Jr., and First National Bank of Butte, Montana.

Service of the within citation accepted and receipt of true copy acknowledged this 5th day of November, 1897.

[JOHN F. FORBIS,
Of Counsel for Andrew J. Davis, Jr., and First National Bank.]*

328 STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

Milton S. Gunn, being duly sworn, deposes and says that he is now and was on the 4th day of November, A. D. 1897, over the age of 21 years and a citizen of the United States and a resident of the State of Montana; that he is not a party to the action or suit mentioned in the within citation, and is not an attorney for either of the parties to said action or suit, and has no interest whatever in the same; that on the 4th day of November, A. D. 1897, he served the within citation on B. Platte Carpenter, one of the attorneys who appeared for the defendants in said action before the supreme court of the State of Montana, by delivering to said Carpenter personally, at his office, in the city of Helena, State of Montana, a true copy of said citation and exhibiting to him the original thereof; that on the 5th day of November, A. D. 1897, he served the within citation on James W. Forbis, one of the attorneys who appeared for the defendants in said action or suit before the supreme court of the State of Montana, by delivering to said James W. Forbis personally, at his office, in the city of Butte, State of Montana, a true copy of said citation and exhibiting to him the original; that on the same day he also served said citation on John W. Forbis, one of the attorneys who appeared for the defendants before the supreme court of the State of Montana in said action or suit, by leaving at his office, in the city of Butte, Montana, with the person in charge of the same, a true copy of said citation; that he was unable to make service of the within citation on W. W. Dixon, one of the attorneys who appeared for the defendants in said action before the supreme court of the State of Montana, on account of the absence of said W. W. Dixon from the State of Montana, and no one being left in charge of his office, the same being closed; that on the 15th day of November, 1897, he mailed a true copy of said citation to the said W. W. Dixon at Butte, Montana, the place of his residence and where his office is located, by placing the same in the post-office at Helena, Montana, in an envelope addressed to the said W. W. Dixon at Butte, Montana, with the postage prepaid thereon; that he has been unable to

[* Words enclosed in brackets erased in copy.]

make service upon M. Kirkpatrick, one of the attorneys for said defendants in said action or suit who appeared before the supreme court of the State of Montana, for the reason that said M. Kirkpatrick is now dead; that the said John F. Forbis duly acknowledged the service of said citation, both for himself, W. W. Dixon, and James W. Forbis, by endorsing and signing an acceptance of service upon said citation in the presence of this affiant.

And further affiant saith not.

MILTON S. GUNN.

Subscribed and sworn to before me this 15th day of November, A. D. 1897.

[Notarial Seal of Jno. K. Scott, Lewis & Clarke County, Montana.]

JNO. K. SCOTT,
Notary Public, Lewis & Clarke County, State of Montana.

Filed Nov. 15, 1897.

BENJ. WEBSTER,
Clerk Supreme Court, State of Montana.

[Endorsed:] In the Supreme Court of the United States. John H. Leyson, administrator, etc., plaintiff in error, *vs.* Andrew J. Davis, Jr., *et al.*, defendants in error. Return to writ of error.

Endorsed on cover: Case No. 16,730. Montana supreme court. Term No., 517. John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff in error, *vs.* Andrew J. Davis, Jr., and The First National Bank of Butte. Filed November 26th, 1897.

FILED,
FEB 16 1898
JAMES H. McKENNEY

517.

Brief of Britton, Dixon, Browne & Forbis for D. C.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Feb. 16, 1898.

JOHN H. LEYSON, AS ADMINISTRATOR WITH THE WILL ANNEXED OF ANDREW J. DAVIS, DECEASED,
PLAINTIFF IN ERROR,

v.

ANDREW J. DAVIS, JR., AND THE FIRST NATIONAL BANK OF BUTTE.

No. 517.

In Error to the Supreme Court of the State of Montana.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

A. T. BRITTON,
W. W. DIXON,
A. B. BROWNE,
B. PLATT CARPENTER,
JAMES W. FORBIS,
Att'ys for Defendant in Error,
Andrew J. Davis, Jr.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN H. LEYSON, AS ADMINISTRATOR WITH THE WILL ANNEXED OF ANDREW J. DAVIS, DECEASED, PLAINTIFF IN ERROR, v. ANDREW J. DAVIS, JR., AND THE FIRST NATIONAL BANK OF BUTTE.	No. 517.

In Error to the Supreme Court of the State of Montana.

MOTION TO DISMISS OR AFFIRM.

Now comes defendant in error, Andrew J. Davis, Jr., by his counsel, and respectfully moves dismissal of the writ of error in above-entitled cause, for want of jurisdiction in this honorable Court,—

1. Because no federal question is presented by the record in any proper or sufficient way.
2. Because no federal question exists in the cause.

3. Because the decision of the Supreme Court of Montana rests upon other grounds sufficiently broad to maintain its decree.

Or for affirmance of the decree.

A. T. BRITTON,
A. B. BROWNE,
W. W. DIXON,
B. PLATT CARPENTER,
JAMES W. FORBIS,
Att'ys for Defendant in Error,
Andrew J. Davis, Jr.

To ROBERT G. INGERSOLL,
Messrs. LOGAN, DEMOND and HARDY,
EDWIN W. TOOLE, HENRY A. ROOT,
Attorneys for Plaintiff in Error:

Please take notice that on Monday, the 14th day of March, 1898, at the court-room of the Supreme Court of the United States, in the city of Washington, at the opening of said Court, at 12 o'clock of said day, or as soon thereafter as counsel can be heard, the defendant in error, Andrew J. Davis, Jr., will move said Court to dismiss the writ of error herein to the Supreme Court of the State of Montana, upon the ground that this Court has no jurisdiction to hear said writ, and that no writ of error lies from the judgment or decree of said State Court. And said defendant in error will, at the same time and place, move said Court to affirm the decree of the Supreme Court of the State of Montana, from which said writ is prosecuted.

Said motion will be heard on the printed transcript of said case No. 517, on file in the Clerk's office of said Supreme Court of the United States, and the attached Brief.

A. T. Britton,
A. B. Browne,
W. W. Dixon,
B. Platt Carpenter,
James W. Forbis,
Att'ys for Defendant in Error,
Andrew J. Davis, Jr.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

This action was commenced on December 20, 1893, by James A Talbott, "as special administrator of the estate "of Andrew J. Davis, deceased," and is continued by appropriate order in the name of his successor, Leyson, the plaintiff in error here, as administrator c. t. a. (Rec. 145).

The pleadings and issues thereby framed (Rec. 5–12) are so fully stated by counsel for the administrator before the Supreme Court of Montana in the voluminous brief there filed, that to avoid all possible error or dispute we reproduce such statement thereof as follows:

"STATEMENT OF THE CASE.

"The appellant, as special administrator of the estate "of Andrew J. Davis, deceased, commenced this action "in the District Court, Second Judicial District of the "State of Montana, for the County of Silver Bow, to re- "cover nine hundred and fifty shares of the capital stock "of defendant bank, alleged by him to belong to the "estate of said deceased, and claimed by said defendant, "Davis, Jr., under a *donatio causa mortis*.

"The material allegations of the complaint are, that "appellant was and is the duly qualified and acting ad- "ministrator of said estate; that the defendant bank was "and is a national bank, duly organized and existing "under the laws of the United States, and that said de- "cedent at the time of his death was the owner of said "nine hundred and fifty shares of the capital stock of "said defendant bank, which he had never endorsed, "transferred, conveyed, or otherwise disposed of, and "that said shares of stock at the time of the death of "said decedent stood and still stand upon the books of "said bank in his name, and that each of said certificates "of stock contain the following provision: 'Transferable "'only by him or his attorney on the books of this bank "'on the surrender of this certificate.' That prior to the

" commencement of this action appellant presented to the
" officers of said bank a duly certified copy of his letters
" of administration and demanded that said stock be
" transferred to him as such administrator upon the books
" of said bank, which was refused; that said decedent
" was in no way indebted to said bank, and that it has
" and claims no lien upon said stock. That the said de-
" fendant, Andrew J. Davis, Jr., was and is the cashier
" and one of the directors of said bank, has possession of
" said certificates of stock, and claims some right or title
" thereto or interest therein; that said defendant, Andrew
" J. Davis, Jr., has not such financial responsibility as
" equals the volume of said stock; that his claim thereto
" has no foundation in law or equity; that he refuses to
" surrender or deliver up said shares of stock, although
" demanded so to do, and that said claim and possession
" of said certificates of stock casts a cloud upon appel-
" lant's title as such administrator, and prevents him from
" obtaining a transfer of said stock upon the books of
" said bank. It also alleges that the entire capital stock
" of said bank consists of one thousand shares; that
" said bank is an established institution with a large and
" increasing business, and that the dividends that will be
" earned on said stock and the increased values thereof
" will greatly exceed the interest on its present value com-
" puted at the legal rate; that he has no plain, speedy,
" and adequate remedy at law, and that this action is
" brought in pursuance of an order of said District Court.
" The prayer is that the claim of said defendant, Andrew
" J. Davis, Jr., be declared void; that he be compelled
" to deliver up said certificates of stock, and that defend-
" ant bank be required to transfer the same upon its
" books and issue new certificates therefrom to this ap-
" pellant as such administrator.

" To this complaint the defendants made separate
' answers. The said defendant, Andrew J. Davis, Jr.,
' denies that said shares of stock, or any of them, or the
' certificates representing the same or any thereof, were
' or are the property of said decedent left by him at the
' time of his death; denies that said decedent was the

" owner of the whole or any of said stock or certificates, " or that he never transferred, conveyed, or otherwise dis- " posed of the same, and avers that said defendant is the " owner and in possession of said shares of stock and the " certificates thereof, and was such owner and in posses- " sion at the time of the death of said decedent; he " denies that his claim to the said shares of stock and the " certificates thereof is without merit or foundation in law " or equity, or that his claim to said stock or possession " of said certificates casts any cloud upon appellant's " title, or that he ever had or has any title thereto; he " admits that he is and for several years last past has " been cashier of said defendant bank, but denies that he " now is or has been at any time since the death of said " decedent a director thereof.

" The answer for affirmative matter substantially avers " that said defendant, Andrew J. Davis, Jr., was a nephew " of said decedent, was cashier of said bank for several " years before his death, and for some time before said " death he managed and attended to all the business of " said bank; that in the latter part of the month of De- " cember, 1889, said decedent was and had been for " some months seriously and dangerously ill, and suffering " from the disease and ailment of which he afterwards " died; that he was then about seventy years of age and " preparing to travel to the Pacific Coast for his health. " That on the twenty-seventh or twenty-eighth day of " December, 1889, at Butte City, in the County of Silver " Bow and State of Montana, said decedent, being " seriously and dangerously ill, and suffering from the " disease and ailment of which he afterwards died, but " being of sound and disposing mind, and in view and " apprehension and expectation of his death, gave to said " defendant as a gift the shares of stock and certificates " thereof described in the complaint, and at the same " time delivered said certificates of stock to defendant as " a gift, and that defendant then and there received " and accepted the same, and that thereafter, on the " eleventh day of March, 1890, said decedent died of " said disease and ailment of which he was suffering at

" the time he made said gift and the delivery of said stock " and the certificates thereof to defendant, and he has ever " since said gift and delivery held in his possession, claimed " as his own, said shares of stock and the certificates " thereof, and now so holds and claims the same, and is " entitled to have said stock transferred upon the books of " defendant bank, but that said bank and the directors " refused and still refuse to permit said transfer to be " made until the rights of said parties to said stock and " shares are determined by the Court.

" The prayer is that said defendant, Andrew J. Davis, " Jr., be adjudged the owner of said stock and certificates " thereof; that said appellant as such administrator and " said estate have no right or interest therein, and that " said defendant bank be requested to make the proper " transfers upon its books to him.

" The separate answer of defendant bank in substance " says, it is not advised whether said shares of stock be- " longed to the estate of said decedent at the time of his " death or whether or not said decedent ever endorsed, " transferred, or conveyed or otherwise disposed of said " stock or any thereof to any person, or whether he was the " sole owner thereof, or as to whether or not the claim " of the said defendant, Andrew J. Davis, Jr., is without " foundation or merit in law or equity, or as to whether " or not his claim or possession casts a cloud upon the " title of appellant as such administrator, but insists upon " proof thereof so far as is necessary to protect the rights " of defendant bank. It states that defendant, Andrew J. " Davis, Jr., is now and has been for several years last " past cashier of said defendant bank, but denies that he " is now or has been at any time since shortly after the " death of said decedent a director thereof; that it has " no interest in the controversy; that it has heretofore " refused and now refuses to make any transfers of said " stock upon its books, although requested by appellant " and said Andrew J. Davis, Jr., to do so, and that it is " ready to make such transfers or whatever else the Court " may order it to do in the premises.

" To the separate answer of the said defendant, Andrew

" J. Davis, Jr., appellant filed his replication, which is sub-
" stantially as follows:

" He denies the serious or dangerous illness of said
" decedent or that he died from any disease or ailment of
" which he was suffering at the time of the alleged gift or in
" December, 1889, or that on account thereof the decedent
" was preparing to travel to the Pacific Coast for his
" health; denies that on the twenty-seventh or twenty-
" eighth day of December, 1889, at Butte City, Montana,
" or at any other time or place, said decedent ever made
" the gift of said shares of stock or certificates thereof to
" said defendant Andrew J. Davis, Jr., or that he ever ac-
" cepted or received the same, or held or retained posses-
" sion thereof under any such gift, or that said decedent
" was of sound and disposing mind at the time of the al-
" leged making of the same, or that he died on account of
" the disease or ailment of which he was suffering at the
" time of the alleged making thereof, and avers that the
" facts set forth in his complaint are true, and asks judg-
" ment according to the prayer of the same.

" Upon the issues thus framed the case was, by agree-
" ment of parties, tried by the court, sitting without a
" jury."

The findings of fact and conclusions of law by the trial Court are as follows (Rec. 81–84):

"*Findings of Fact.*

I.

" In the latter part of December, 1889, Andrew J. Davis,
" now deceased, was and had been for some months seri-
" ously and dangerously ill and suffering from the disease
" and ailment from which he afterwards died.

II.

" That on or about the 27th or 28th day of December,
" 1889, at Butte City, in the County of Silver Bow and

" State of Montana, the said Andrew J. Davis, now de-
" ceased, being then seriously and dangerously ill and
" suffering from the disease and ailment of which he af-
" terwards died, and in view and in apprehension and ex-
" pectation of his death from said disease and ailment,
" gave to Andrew J. Davis, one of the defendants herein,
" as a gift, the shares of stock and certificates thereof of
" The First National Bank of Butte, one of the defend-
" ants herein, which are described in the complaint, and
" at the same time delivered said certificates of stock to
" the said Andrew J. Davis, one of the defendants herein,
" as a gift. The said defendant, Andrew J. Davis, then
" and there received and accepted the same.

III.

" That thereafter, on the 11th day of March, 1890, at
" Butte City, Montana, the said Andrew J. Davis died
" from the same disease and ailment from which he was
" suffering at the time he made the gift and delivery of
" the said stock and certificates thereof to Andrew J.
" Davis, one of the defendants herein and as above found.

IV.

" That said Andrew J. Davis, one of the defendants
" herein, has ever since said gift and delivery above found
" retained and held in his possession and claimed as his
" own, and does now so hold in his possession and claim
" as his own, all of the said shares of stock and the cer-
" tificates thereof described in the complaint.

V.

" That at the time of the gift and delivery of the said
" shares of stock and certificates thereof by the said An-
" drew J. Davis, now deceased, to the said Andrew J. Davis,
" one of the defendants herein, as above found, the said
" Andrew J. Davis, now deceased, was of sound and dis-
" posing mind.

VI.

"That at and long prior to the time of the gift and de-
"livery of the said stock and certificates thereof, as above
"found, the said Andrew J. Davis, now deceased, had and
"expressed a great affection for and a great confidence in
"the business capacity and character of the said Andrew
"J. Davis, one of the defendants herein.

VII.

"That at the time of the gift of the stock and certifi-
"cates thereof, as above found, it was and, for several years
"prior thereto, had been the intention of the said Andrew
"J. Davis, now deceased, to give the said stock and the cer-
"tificates thereof of the said First National Bank of Butte
"to the said Andrew J. Davis, one of the defendants
"herein.

VIII.

"The Court further finds as facts:

"That there was no written assignment of said stock or
"certificates of stock or power of attorney executed by the
"donor in connection with the gift; that there was no
"written authority executed by the donor of any kind em-
"powering the defendant Andrew J. Davis or any other
"person for him to transfer said stocks or certificates of
"stock upon the books of the bank during the lifetime of
"the donor, and that there was no transfer of the stock
"or the certificates thereof to the defendant Andrew J.
"Davis upon the books of the bank during the lifetime of
"the donor or ever or at all.

"That at a meeting of the stockholders of the said bank,
"held some time after the said gift had been made, and
"before the death of the donor, John E. Davis, a brother
"of the defendant Andrew J. Davis, was given a proxy in
"writing by said defendant, which had been signed by the
"donor before the date when the gift was made and de-
"livered to defendant Andrew J. Davis before said gift
"was made; that said John E. Davis, under and by the

"directions and according to the request of said defend-
"ant Andrew J. Davis, voted said proxy at said stock-
"holders' meeting; that said John E. Davis had no con-
"versation with the said donor regarding said proxy, and
"after having voted the same, returned it to the defendant
"Andrew J. Davis, who has ever since retained it. That
"the donor was seriously and dangerously ill from a time
"prior to the date when he made the gift until his death,
"and did not revoke said gift or exercise any control over
"said stock or the certificates thereof, nor act as stock-
"holder of said bank.

"That the donor was elected president of said bank
"after he had made said gift, and he continued in that
"position until his death, but said election was without
"his knowledge or request, and he had no knowledge of
"said election of himself as president, or of his holding
"said position, and never did any act as president of the
"said bank from the time he made the gift.

"That there was no gift made or attempted to be made
"by the donor to the defendant Andrew J. Davis, other
"than the gift made about the 27th or 28th of December,
"1889, as heretofore found in findings II.

"That at the time the donor made the gift he was seri-
"ously and dangerously ill, suffering from the ailment and
"sickness of which he afterwards died, and was contem-
"plating a trip or journey at the time.

"That the gift by the donor to the defendant Andrew
"J. Davis was an absolute gift and was and is a valid
"gift, *mortis causa*, and the donee has ever since held
"possession and exercised control and dominion over said
"stock with the knowledge of the donor, arising and re-
"sulting only from the fact of the gift and the donee's
"possession.

"*Conclusions of Law.*

I.

"That the defendant Andrew J. Davis is the owner of
"the stock and shares and certificates thereof of the First
"National Bank of Butte, which are described in the com-

" plaint herein, and is entitled to have said shares and " stock transferred to him on the books of said bank, and " to have new certificates issued to him therefor, and that " said donor was divested of his possession, dominion, and " control of said shares of stock by said gift.

II.

" That the plaintiff herein, as special administrator of " the estate of Andrew J. Davis, deceased, or otherwise, has " not, nor has said estate, any right, title, or claim in or " to the shares of stock and the certificates thereof de- " scribed in the complaint or any part thereof."

III.

" That the defendant Andrew J. Davis is entitled to a " decree herein in accordance with the prayer of his an- " swer, and such decree is hereby ordered entered."

Decree was so entered. (Rec. 87.)

On appeal the Supreme Court of Montana in an opinion covering thirty-nine pages of this printed record exhaustively reviews the facts and law involved, and with most elaborate discussion of the authorities both in England and this country sustain the claim of Davis to this stock as a *donatio causa mortis*, and affirm the judgment below. Its judgment of affirmance was entered on November 25, 1895. The pending writ of error is dated October 29, 1897.

ARGUMENT.

The questions presented in order by the motion to dismiss are :

First. Is a federal question raised by the record in any proper or sufficient way ?

Second. Could any federal question properly arise in the cause ?

THIRD. IF SO, DOES THE DECISION OF THE SUPREME COURT OF MONTANA REST UPON OTHER GROUND SUFFICIENTLY BROAD TO MAINTAIN ITS DECREE?

Negative answer to the first or second question, or affirmative answer to the third, must result in dismissal of pending ~~suit~~. unit

I.

IS A FEDERAL QUESTION RAISED BY THE RECORD IN ANY PROPER OR SUFFICIENT WAY?

A.

Such jurisdiction does not arise because a National Bank is a party hereto. The Act of July 12, 1882, (22 Stats. 162, Ch. 190, Sec. 4) places such association on footing with domestic banks in the States in suits not involving the United States, with respect to federal jurisdiction, and this Court in *Leather Manufacturer's Bank* v. *Cooper*, 120 U. S. 778, said:

"Consequently, so long as the Act of 1882 was "in force, nothing in the way of jurisdiction could be "claimed by a national bank, because of the source of "its incorporation. A national bank was by that statute "placed before the law in this respect the same as a bank "not organized under the laws of the United States."

And the judiciary Act of August 13, 1888 (25 Stats. 433, Ch. 866, Sec. 4), further declares that in *all* actions by or against national banks they shall be deemed citizens of the State in which they are located. "And in "such cases the Circuit and District Courts shall not have "jurisdiction other than such as they would have in cases "between individual citizens of the same State," excepting suits brought by the United States or to wind up the affairs of any such bank.

B.

Hence, under Section 709 U. S. R. S., the judgment of the Supreme Court of Montana is not reviewable here, unless the decision of that Court is against a "title, right, "privilege or immunity specially set up or claimed," under "the Constitution, or any treaty or statute of or Com- "mission held or authority exercised under the United "States," and which is controlling.

The "statement of the case," as made by the pleadings and given *supra*, in the exact language of counsel for the administrator before the Supreme Court of Montana, wholly fails to identify *any* "title, right, privilege or im- "munity" so "specially set up or claimed." Analysis of the pleadings confirms the statement in this regard. The complaint (Rec. 5) simply asserts that the defendant bank is "duly organized and existing under and by virtue of "the laws of the United States," but suggests no reference to *any* federal statute or claim of right under *any* federal law. Manifestly this would be insufficient since the Act of 1882 to confer jurisdiction upon any federal Court.

Neither the answer of defendant Davis nor of the bank suggests or implies any reference to any federal statute. The former pleads right in the stock by gift *causa mortis*, and the bank substantially interpleads by offer to abide the "final decision of this case." (Rec. 8–11.) The plaintiff's replication to the answer of defendant Davis (Rec. 11–12) simply traverses the claim by gift.

On these pleadings the case proceeded to proof. Before the trial Court, the Administrator moved for certain findings on the facts and certain conclusions upon the law (Rec. 78–80). Such request for findings upon the facts suggests no right or title claimed under any

federal law. In the request for findings upon the law, the plaintiff asked the Court to rule that the donee, Davis, Jr., did not become a shareholder "by said alleged gift "under the statutes of the United States, and by-laws of "the bank made in pursuance thereof;" did not succeed to the rights and liabilities of the donor, but that the legal title and dominion over the stock remained in the donor and passed to his administrator (Rec. 80). And in moving for decree according to the prayer of the complaint the Administrator simply alleges (Rec. 80) that the transfer was ineffectual to make defendant Davis a shareholder "under the statutes of the United States appli-"cable thereto" and "because the plaintiff herein claimed "the right thereto under said statutes." (Rec. 80–81.)

On motion for new trial many errors of law and fact were assigned (Rec. 90–93), including the averment that the Court was without jurisdiction to make defendant Davis a shareholder, and that its decree was "in viola-"tion of the laws of the United States and by-laws of the "Bank." And further,—

"*l.* The Court erred in not entertaining or passing "upon the Federal question involved, and in not pursu-"ing the rules of the common law adopted by statute in "this State requiring the assignment of said stock to be "in" (writing).

But under the repeated decisions of this Court this general reference to "the laws of the United States" and "the statutes of the United States applicable thereto" is ineffectual to properly or sufficiently present a question reviewable here.

The following cases are illustrative:

In *Maxwell* v. *Newbold*, 18 How. 511, 516, it was held:

"But neither of the questions made there by the errors "assigned refer in any manner to the Constitution or laws "of the United States, except the third, and the language "of that is too general and indefinite to come within the "provisions of the Act of Congress, or the decisions of "this Court. It alleges that the charge of the Court was "against, and in conflict with, the Constitution and laws "of the United States. But what right did he claim "under the Constitution of the United States, which was "denied him by the State Court? Under what clause of "the Constitution did he make his claim? And what "right did he claim under an Act of Congress? And "under what Act, in the wide range of our statutes, did "he claim it?"

And citing with approval *Lawler* v. *Walker et al.*, 14 How. 149, wherein this Court said in dismissing the writ:

"The statutes complained of in this case should have "been stated; without that, the Court cannot apply them "to the subject-matter of litigation to determine whether "or not they violated the Constitution of the United "States,"

the Court in *Maxwell* v. *Newhold* concludes its opinion thus:

"So, in the case before us, the clause in the Constitu- "tion and the law of Congress should have been specified "by the plaintiffs in error in the State Court, in order "that this Court might see what was the right claimed "by them, and whether it was denied to them by the "decision of the State Court."

The same rule was applied in *Messenger* v. *Mason*, 10 Wall. 507, and the writ dismissed, where the Court below certified that there was drawn in question the validity of a certain Territorial Act "on the ground that the same "was in conflict with the ordinance of 1787, the Consti-

" tution of the United States, the treaties and laws thereof, " and that the objections thereto were overruled and the " statute held to be valid."

The most liberal statement of the rule appears in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143, thus:

" But the true and rational rule is, that the Court must " be able to see clearly, from the whole record, that a " *certain* provision of the Constitution or Act of Congress " was relied on by the party who brings the writ of error, " and that the right thus claimed by him was denied."

But the " whole record " in the case at bar manifestly fails to thus " clearly " enable the Court to see what " certain " provision of any Act of Congress is meant. The most that can be said is that the Court is invited to examine " the statutes of the United States " relating to national banks. These extend from 1863 to date; comprise some 133 sections of the Revised Statutes, found in various parts thereof, and some twenty subsequent general enactments relating to the same subject, extending from 1874 onward. When neither the complaint nor the bill of exceptions aids the Court in this direction, and the whole record comprises 166 printed pages, we submit sound practice and the decided cases *supra* unite in compelling dismissal of a writ where its foundation rests in such obscurity.

Nor does the opinion of the Supreme Court of Montana relieve the situation. Again observing that the *whole* question decided by that Court was one of *general* law only, viz., that the stock in question was the subject of a valid gift *causa mortis*, as between donor and donee, whereby the equitable title vested in defendant Davis, the Court observes (Rec. 142):

" The Court is asked to pass upon the ' Federal ques-

" 'tion' involved in this case. To us it appears, however, " that the main point involved is whether there has been " a valid gift *causa mortis*. It being clear to us that the " equitable title to the stock passed by the delivery of the " certificates, no decision has been made upon that point " other than by the common law generally, for we do not " think the statutes of the United States attempt to reg- " ulate the transfer of such an equitable title; but if there " is a Federal question involved it is this: Can an inter- " est in the shares of a national bank be legally trans- " ferred by the owner thereof to a donee, as a gift *causa* " *mortis*, so as to confer the equitable title upon the " donee, without a written transfer of the shares on the " books of the bank or an indorsement on the back of " the certificates themselves? We answer that question " affirmatively, in the light of the decisions of the Su- " preme Court of the United States, that a transfer on the " books of a national bank is not necessary to give to the " donee an equitable title to the shares. National Bank *v.* " Watsontown Bank, 105 U. S. 220; Bank *v.* Lanier, 11 " Wall. 378; Johnston *v.* Laflin, 103 U. S. 804; Black *v.* " Zackarie, 3 How. 513. Judge Brewer, as Circuit Judge, " held, in Kansas *v.* Bradley, 26 Fed. 289, that a propo- " sition once decided by the Supreme Court of the United " States is no longer to be treated as a Federal question. " Nor do questions which involve the ownership of na- " tional-bank shares always present Federal questions. " Williams *v.* Weaver, 100 U. S. 547; Le Sassier *v.* Ken- " nedy, 123 U. S. 521."

Resort to the petition for writ of error cannot be had, for this Court has repeatedly ruled that such petition forms no part of the record upon which to determine whether a Federal question arose and was decided in the State Court.

Clark v. *Pennsylvania*, 128 U. S. 395.
Manning v. *French*, 133 U. S. 186.
Butler v. *Gage*, 138 U. S. 52.
Leeper v. *Texas*, 139 U. S. 462.
California Powder Works v. *Davis*, 151 U. S. 388.

II.

Could any Federal Question Properly Arise in the Cause?

Manifestly the Supreme Court of Montana understood that such question did *not* so arise. The opinion of that Court deals with the single and controlling question made by the pleadings and proof, and to which the voluminous briefs and extended arguments of counsel were directly addressed, viz: were these shares of stock, *as between the parties*, donor and donee, in fact given and effectually transferred by the delivery made in the manner and under the circumstances disclosed by the evidence? The lengthy opinion of that Court, found in this record, deals wholly with *that* subject: the Court digresses therefrom in less than a page of its opinion to speak of the "Federal question" assumed by counsel to be involved, but its expressions on that head are manifestly and indeed expressly made with disclaimer of belief that any federal question was involved in the case, or necessary to the determination thereof. The Court's comments are manifestly made wholly in deference to the request of plaintiff's counsel.

As shown above, the record wholly fails to disclose under what statute of the United States the Administrator's counsel below even claimed that a federal question was presented in this case or could properly arise therein. Conceding *pro argumento* only that the Administrator refers to Sec. 5139 U. S. R. S., we submit—

That Section provides:

"The capital stock of each association shall be divided "into shares of one hundred dollars each, and be deemed "personal property, and transferable on the books of the

" association in such manner as may be prescribed in the " by-laws or articles of the association."

The By-Law of defendant Bank, No. 21 (Rec. 74), although not incorporated in the findings of fact, prescribes that its stock shall be " assignable and transferable only " on the books of this bank subject to the restrictions and " provisions of the banking laws and transfer book shall " be provided, in which all assignments and transfers of " stock shall be made. No transfer of stock shall be " made without the consent of the board of directors by " any stockholder who shall be liable, either as principal " debtor or otherwise."

And the complaint avers (Rec. 5) that the stock certificates in question contain the provision, " Transferable " only by him or his attorney on the books of this bank " on the surrender of this certificate," which transfer had not been made.

Concede all of foregoing to be true—and it is *all* the claim possible to be made as involving any federal question—and the conclusive answer is that no federal question is thereby even colorably raised.

The statute in terms declares that the stock " shall be " deemed personal property." It was and is therefore that character of property whereof ownership *as between the parties* is transferred by mere delivery of the evidence of such ownership, to wit, the certificates of stock. *All* that the Court below decides is that as between the donor and donee here, there was a valid gift *causa mortis*, whereby (Op. Rec. 140) the equitable title passed to the donee, who, " having an equitable title and a legal right, " may enforce that right by the aid of equity." Manifestly the administrator, being in succession only in the estate of the donor and representative thereof, is bound by the

results of the donor's valid and authorized acts. As the Court below observes, "We need not consider the attitude "of third parties or creditors, because none have appeared "in this case." And the valid and binding effect of the transfer of national bank stock by mere delivery *inter partes*, without recorded transfer on the books of the bank, is expressly affirmed by this Court in *Johnson* v. *Laflin*, 103 U. S. 800, wherein the Court declares that—

"The entry of the transaction on the books of the bank "where stock is sold is required *not for the translation of* "*the title*, but for the protection of the parties and others "dealing with the bank, and to enable it to know who "are its stockholders entitled to vote at their meetings, "and receive dividends when declared."

And the opinion further and significantly declares that—

"The transferability of shares in the national banks is "not governed by different rules from those which are "ordinarily applied to the transfer of shares in other "corporate bodies."

The general rule is well stated in *Am. & Eng. Ency. Law*, Vol. 23, p. 649, Title "Stock," thus: "So the mere "manual delivery of the certificate to another may be "sufficient to vest in him the ownership of the stock."

Again (p. 655):

"There is a substantial agreement in the cases that a "transfer in other respects regular but without the re-"quired registration is valid as between the parties, and "passes the interest of the transferrer," citing many authorities.

And the same authority, Vol. 16, p. 198, Title "Na-"tional Banks," declares:

"The assignment of national bank shares, without a "transfer on the books of the bank, does not constitute "a complete transfer in merely legal contemplation, so as "to effect an actual substitution of shareholders, binding "upon the corporation. *But as between the immediate* "*parties to the transaction, the assignment is effectual,* "*and would be recognized and enforced, at least in equity,* "*as against all parties not showing a superior right,*" citing

Johnson v. *Laflin, supra.*
Continental National Bank v. *Eliot National Bank,* 7 Fed. Rep. 369.
Nicollet National Bank v. *City Bank,* 38 Minn. 85.

"The true view, it is submitted, is that such a transfer "does not pass the legal title, but that it passes the "equitable title, coupled with irrevocable power to ac- "quire the legal title."
Ames Bills and Notes, Vol. 2, p. 784.

National bank stock may certainly be bequeathed. The legatee could not secure record transfer thereof until probate of the will. Suppose the will should be contested in a State court on the ground that it was a forgery, or the testator not of sound or disposing mind, or that by some patent ambiguity therein, the legacy must fail. Could the case be brought to this Court under claim that a federal question was necessarily involved because the property attempted to be disposed of thereby was national bank stock, not transferred on the books of the bank? Yet that is only another way of stating *this* case. Or, suppose national bank stock is attached for debt or taken in execution, would the jurisdiction of this Court attach because of the nature of the *res?* Clearly not. Yet the same assertion could be made. Denial of the debt or defects in the judgment or writ would not any the less present a federal question than does this

case, which involved only the question whether a gift *causa mortis* was made *effectual as between the parties*, and, if so, necessarily binding on the Administrator of the donor's estate. Had the donor sought to revoke his gift and compel the donee to surrender the certificates solely on the ground that no record transfer had been made, how could such claim present any federal question? His Administrator and those claiming by descent from the donor stand in no different relation—are neither purchasers, creditors, nor third parties, but are clearly bound where the donor would be and possess no remedies which he could not equally enjoy.

In *Black* v. *Zacharie*, 3 How. 483, 513, the same question arose and was decided by this Court thus:

"It is true that the charters of the Carrollton Bank and "of the Gas Light and Banking Company provide that "no transfer of the stock of these corporations shall be "valid or effectual until such transfers shall be en- "tered or registered in a book or books to be kept for "that purpose by the corporation. But this is mani- "festly a regulation designed for the security of the bank "itself and of third persons taking transfers of the stock "without notice of any prior equitable transfer. *It re-* "*lates to the transfer of the legal title*, and not of any "equitable interest in the stock subordinate to that title. "In the case of the Union Bank of Georgetown *v.* Laird, 2 "Wheat. 390, this Court took notice of the distinction "between the legal and equitable title in case of bank "stock where the charter of the bank had provided for "the mode of transfer. The general construction which "has been put upon the charters of other banks containing "similar provisions as to the transfer of their stock is, "that the provisions are designed solely for the safety "and security of the bank itself, and of purchasers with- "out notice; and that as between vendor or vendee a "transfer, not in conformity to such provisions, is good

" to pass the equitable title and divest the vendor of all " interest in the stock. Such are the decisions in the " cases of The Bank of Utica *v.* Smalley, 2 Cowen 777, " 778; Gilbert *v.* Manchester Iron Co., 11 Wend. 628; " Commercial Bank of Buffalo *v.* Kortwright, 22 Wend. " 362; Quiner *v.* Marblehead Insurance Co., 10 Mass. " 476, and Sergeant *v.* Franklin Ins. Co., 8 Pick. 90."

In the Union Bank of Georgetown *v.* Laird, *supra*, the bank was chartered by an Act of Congress (2 Stats. 639) which provided that the shares "shall be transferable " only on the books of the bank, according to such rules " as may, conformably to law, be established in that be- " half by the President and Directors," with right in the bank to refuse transfer where the stockholder was indebted to the bank. Speaking thereto, this Court said:

" No person, therefore, can acquire a legal title to any " shares, except under a regular transfer, according to " the rules of the bank; and if any person takes an " equitable assignment, it must be subject to the rights of " the *bank*, under the Act of incorporation, of which he " is bound to take notice."

All the authorities concur that *as between the parties* title passes by mere delivery of the certificates without recorded transfer. Many of the cases hold that the entire legal and equitable title passes; others that only the equitable title passes—as are the federal cases. But in *Thompson on Corporations*, Vol. 2, Secs. 2390, 2392, the author, after full review of the cases, well harmonizes the apparent differences by the sound observation (Sec. 2393) that—

" So, the legal owner of shares in a corporation is the " owner in whose name the shares stand on the books of " the corporation, whereas the equitable owner is the one

" who, being the beneficiary, that is the real owner, is
" not registered as such on the corporate books, and who
" must, if the corporation refuse so to register him, go
" into a Court of Equity to compel them to do so. The
" real meaning is that his title is complete as against
" everybody but the corporation itself, and those who
" have a superior right to have the corporation make the
" transfer to them."

This is precisely this case, and precisely the relief decreed below to the defendant in error, Davis. The Administrator—having no right superior to the donor and manifestly bound by the donor's valid acts—insists that solely because the transfer was not made on the books of the bank as the by-laws required, *he* is entitled to claim the certificates on the assumption that the legal title as against him did not pass by the gift to the defendant donee. The bank asserts no claim against the stock, and hence the Administrator's assertion that the technical legal title did not pass is answered by the Supreme Court of Montana by its holding that *as between donor and donee* a valid gift of the stock was made by the delivery thereof, carrying the equitable title, and under which the donee can call for the legal title by recorded transfer as against the representative of the donor's estate and those who may claim under him by mere descent. In thus ruling, that Court did not pass upon any federal question, for the right of the donor to make the gift, and its effect as between donor and donee, raises no federal question, but is solely a question of general law, on which the conclusions of the Court below are manifestly not here open to review. Beyond controversy, the donor could thus pass his right to the stock; in so doing he was not exercising any right created by or resting upon any federal law, but solely the common-law privilege of

disposing of his own property. Equally clear is it that the Administrator of his estate cannot challenge the validity of the donor's disposal upon any claim that under the federal law *he* can now assert a title which his testator voluntarily relinquished and disposed of.

In the able brief of counsel for the Administrator before the Supreme Court of Montana the whole matter was concisely and correctly stated thus:

> " What, then, is the logical result? By the statute of " the United States the mode of transfer and rights of the " shareholder as to the bank are defined, and *by the laws* " *of the State the mode of transfer and its results as be-* " *tween the parties to the transaction are defined.*"

The bank makes no claim against the stock; the pleadings and the proofs relate only to the transaction "*between* " *the parties.*" Counsel thus admits that is controlled solely " by the laws of the State." Manifestly the Court below so understood and so decided the case. Its decision is the final law of the case upon the only question which it does or can present, and having thus determined the " law of the State " as to " the mode of transfer and " its results as between the parties to the transaction," the absence of any federal question is determined both by counsel's admission and on plainest principle.

The existence of a " federal question " is not mere matter of claim or pleading alone, but of substance and proof; otherwise an astute pleader could bring any case within cognizance of the federal judiciary, not upon the real facts, but on mere assertion of assumed facts. Obviously, such jurisdiction must rest upon a substantial claim and a record in harmony therewith. Diverse citizenship may be asserted by a plaintiff, but, if disproven in fact, federal jurisdiction fails. So here the Administrator may assert

existence of a federal question, but, if the whole record demonstrate that such question does not so exist, the mere assertion cannot confer jurisdiction. Otherwise federal jurisdiction could be expanded by mere fictitious suggestion, in comparison with which the fiction of ouster in the ancient action of ejectment would be but a mild circumstance.

Conclusion herein may be aided and illustrated by plain analogy:

Thus by Section 4898, U. S. R. S., interests in patented inventions may be assigned, but are declared void against parties without notice unless the assignment is recorded in the United States Patent Office within three months from the date thereof.

In *Am. & Eng. Ency. of Law*, Vol. 18, p. 136, Title "*Patent Law*," many State decisions are cited to support the doctrine of the text that—

> "The recording of an assignment is not requisite to its "validity, and an unrecorded assignment is binding on "the parties thereto, and on others having notice thereof, "or mere trespassers."

And the same volume, p. 70, declares:

> "The State Courts have exclusive jurisdiction over "questions arising out of contracts made concerning "patent rights, or inventions, where there is no other "source of Federal jurisdiction involved.
>
> "*Torts.* State Courts have jurisdiction over questions "arising out of torts not involving the infringement "or validity of the patent."

The same rule was declared in Marsh *v.* Nichols & Co., 140 U. S. 344, where, in reviewing the prior decisions of this Court to the same effect, the Court repeats the language of the Court in *Wilson* v. *Sandford*, 10 How. 99, 101,

that the dispute "does not arise under any act of Con-
"gress; nor does the decision depend upon the construc-
"tion of any law in relation to patents. It arises out of
"the contract stated in the bill; and there is no act of
"Congress providing for or regulating contracts of this
"kind. The rights of the parties depend altogether upon
"common-law and equity principles."

So in the case at bar it is conceded that the donor owned the stock; necessarily he enjoyed with respect thereto the full *jus disponendi;* the donee asserted a valid gift thereof to him; the pleadings and proof raise the distinct issue *only* upon *that* question. The Court below decides that the gift was made; that thereby title passed as *between the parties*, donor and donee, with consequent right of the donee in equity to call for the legal title. This is *all* of the case and *all* of the decision. The Administrator asserts because the legal title could not fully pass until by record transfer on the books of the bank that hence a federal question arises, How? If the bank had no superior lien or claim upon the stock in the hands of the donor—and it expressly disclaims any such—manifestly the donee has the right to call for such record transfer. In legal effect the Administrator is bound to aid that demand and yield obedience to the Court's decree so directing. He is not in position, as successor only in the estate of the donor, to assert a right which the donor could neither exercise nor attempted so to do. In effect his contention is that, although the Court has decided that the donor did make a transfer of his stock binding on him, it is not binding on me, solely because the legal title had not fully passed by a recorded transfer. I claim more than the donor—my right is superior to his, because I am not bound by his equitable transfer to the donee. And

it is this claim, untrue in fact and unsound in law, on which the entire assertion of a federal question as here present is founded. This Court has decided, *supra*, *Johnson* v. *Laflin*, 103 U. S. 800, that such record transfer is *not* required "for the translation of the title," and that "The transferability of shares in the national banks "is not governed by different rules from those which are "ordinarily applied to the transfer of shares in other cor-"porate bodies." The Court below has decided as matter of *general* law that a valid gift, *causa mortis*, was made, and as matter of *general* law that it transferred the equitable title as between the parties by the delivery of the stock without such recorded transfer. In so doing it has not passed upon any federal question, but its decision as matter of general law on the force and validity of such transfer, *inter partes*, stands in entire harmony with the rulings of this Court. It manifestly binds and concludes the Administrator.

Otherwise stated, the Court below decides (1) that a valid gift, *causa mortis*, was made, and (2) the delivery of the stock, as between the parties donor and donee, transferred the equitable title thereto. But the Administrator says because the transfer was not recorded on the books of the bank, the full, legal record title did not so pass. But the Court below does not decide that it *did*. Its ruling is that the donee, having the equitable title, may, as against the bank (which asserts no claim) and as against the Administrator, take decree for transfer of the full record title. Clearly the Supreme Court of Montana did *not* decide any proper claim of the Administrator adversely to him, and as clearly the ground of the decision disposed of *the* question involved without reaching any federal question of possible existence in the case.

Union National Bank v. *Louisville, &c., Ry*, 163 U. S.

325, 331, involved the defense of usury against a demand of the bank, which defense was sustained in the State Court. In dismissing the writ of error this Court said:

"It may be said that the rights of a national bank as to "interest are given by the Federals tatute; that the refer- "ence to the State law is only for a measure of those "rights; that a misconstruction of the State law really "works a denial of the rights given by the Federal stat- "ute, and thus creates a Federal question. *Miller's Ex- "ecutors* v. *Swan*, 150 U. S. 132. A sufficient answer is "that the true construction of State legislation is a "matter of State jurisprudence, and while the right of the "national bank springs from the act of Congress, yet it "is only a right to have an equal administration of the "rule established by the State law. It does not involve "a reservation of the national courts of the authority to "determine adversely to the State Courts what is the rule "as to interest prescribed by the State law, but only to "see that such rule is equally enforced in favor of na- "tional banks. The decision here was not against any "equality of right, but only a determination of the mean- "ing of the State law as applied to all creditors. It "therefore denied no rights given by the Federal stat- "utes, and involved no judgment adverse to plaintiff "as to its meaning and effect. It assumed that the "plaintiff's interpretation of that statute was correct, and "ruled nothing against it. It presents no Federal ques- "tion. It is broad enough to cover this case. It was "relied upon by the Supreme Court, and therefore the "case is, by the settled law as heretofore announced, one "which does not come within the jurisdiction of this "Court. The writ of error is dismissed."

The case has equal application here, for as was ruled in Johnson *v.* Laflin, 103 U. S. 800, transfers of national bank shares are "not governed by different rules from "those which are ordinarily applied to the transfer of "shares in other corporate bodies." In other words,

they are governed by the general law. The State Supreme Court has ruled in this case that by such *general* law valid transfers may be made *as between the parties* by mere delivery of the shares and without recorded transfer on the books of the bank. In so doing no right of the bank has been invaded or affected, nor any rights of the parties to the transaction which are cognizable solely under federal law.

The Administrator invoked the aid of equity by this suit to compel defendant in error Davis, Jr., to deliver the certificates of stock to him. The manifest basis of his claim was *not* that the federal law gave to him as the representative of the estate or for the benefit of the next of kin the right to so receive the stock. That right could come only from the general or local law of the State and as administered in her Courts, and the Administrator so framed his complaint. The utmost the Administrator could in any view claim under any federal law was in a collateral way only, viz: that as Administrator he took by the general law title to all personal property owned by decedent at the time of his death, and as the national banking law required transfer of the *legal* title on the books of the banks, and such transfer had not been made, *therefore* he succeeded by the common or State law to the ownership and control of the certificates in question. But we submit, as entirely applicable here, the holding of this Court in *Conde et al.* v. *York et al.* (No. 143 of present term), 16 S. C. Rep., p. 234, that—

"In this case the controversy was merely as to which
" of the claimants had the superior equity in the fund;
" the statute was only collaterally involved and plaintiffs
" in error asserted no right to the money based upon it."

Accordingly in the case cited the Court dismissed the writ.

III.

DOES THE DECISION OF THE SUPREME COURT OF MONTANA REST UPON OTHER GROUNDS SUFFICIENTLY BROAD TO MAINTAIN ITS DECREE?

In *California Powder Works* v. *Davis*, 151 U. S. 389–393, this Court said:

"It is axiomatic that, in order to give this Court juris-
" diction on writ of error to the highest Court of a State
" in which a decision in the suit could be had, it must
" appear affirmatively not only that a Federal question
" was presented for decision by the highest Court of the
" State having jurisdiction, but that its decision was
" necessary to the determination of the cause, and that
" it was actually decided or that the judgment as rendered
" could not have been given without deciding it. And
" where the decision complained of rests on an independ-
" ent ground, not involving a Federal question and broad
" enough to maintain the judgment, the writ of error will
" be dismissed by this Court without considering any
" Federal question that may also have been presented.
" *Eustis* v. *Bolles*, 150 U. S. 361."

And this for the manifest reason that the decision of the State Court on questions *not* of a Federal character is not here open to review.

Murdock v. *City of Memphis*, 20 Wall. 590, 631.
Roby v. *Colehour*, 146 U. S. 135, 163.

Or, as most concisely stated by Mr. Chief-Justice Fuller in *Marsh* v. *Nichols, Shepard & Co.*, 140 U. S. 344, 354,—

"It is settled that in order to justify a writ of error
" from this Court to review the judgment of a State Court,
" the record must show that the judgment *rested* upon the
" disposition of a Federal question."

Or, as held in *Citizen's Bank* v. *Board of Liquidation*, 98 U. S. 140, that the decision of such question "was *con-*
"*trolling* in the cause."

Much of the argument under former head is applicable here as demonstrating the controlling question raised by the pleadings and determined by the Court below. Conceding, *pro argumento* only, colorable suggestion of a Federal question, brief analysis of the pleadings and decided case will demonstrate that such Federal question is neither important nor of any effect whatsoever in the full determination of the cause.

The administrator plead (Rec. 5) that the stock stood on the books of the bank in the name of Davis, Sr.; that defendant in error Davis, Jr., had possession thereof; that the Administrator was entitled to such possession and to the transfer of same on the books of the bank, for all of which relief he prayed appropriate decree. The answer of the defendant in error Davis, Jr., denies the claim of such Administrator; sets up in detail the facts constituting the gift *causa mortis* and delivery of the shares to *him* by his uncle, Davis, Sr.; the latter's death; his own assertion of ownership; right to the formal transfer on the books of the bank for which he prays decree, and also for decree adjudging that neither the Administrator nor the Davis estate has any right, title, or claim to said shares. The Administrator's replication traverses in detail all the affirmative matter set up in such answer.

What issue did this pleading raise? Manifestly the issue of fact on which and to which *all* the testimony was addressed, and on which, by overwhelming and substantially uncontradicted proof, the facts as to the gift, the condition of the donor, and his subsequent death from the same ailment, and his long-expressed purpose to make the

gift to the donee, were firmly established. The findings of the trial Court to this effect (Rec. 81–83) are reaffirmed by the lengthy discussion and conclusions upon the proof indulged by the State Supreme Court. These *facts* and the argument and discussion *of the* law upon the subject *of donatio mortis causa* make the whole case as presented to and decided by the State Supreme Court. It would extend this brief beyond all proper limit to recite such arguments or repeat the decision here. It is significant to note, however, that in a brief of 157 printed pages, submitted before the State Supreme Court by counsel for the Administrator, the *entire* argument is devoted to most thorough discussion of the testimony and most exhaustive review of the authorities in this country and in England on the single subject of gifts *causa mortis* and when and what delivery and title must pass thereby. At page 50 of their brief, counsel state the questions of law presented for argument and decision, thus:

"A proper and comprehensive examination of the case "before us, in the light of the evidence contained in the "record, can better be accomplished by classification of "the authorities under four separate headings.

"First. The consequences of a failure to endorse or "assign the *certificates of stock* and transfer the stock upon "the books of the bank *at common law and under the* "*American decisions.*

"Second. Whether there was a sufficient delivery upon "the standpoint that all dominion, control, and posses-"sion, as far as the nature of things will admit of, must "pass from the donor to the donee at the time of the gift, "the title to vest in the latter upon condition subsequent.

"Third. Was the stock, after the conversation and tran-"saction detailed, as perfecting the alleged gift, left so "that the donor had or *could* exercise dominion, posses-"sion or control of the same during his lifetime?

"Fourth. The effect of the condition attached to the "gift."

Thence onward and covering over one hundred printed pages counsel discuss these propositions as stated. Wherein do they even *suggest* any federal question? The brief for defendant Davis proceeded along the same lines of discussion. Thus all counsel in the case treated the question as one of *general* law. Reading the decision of the State Supreme Court and it will be clearly seen that the Court followed the same line of discussion and the example set by all the counsel. In other words, the concurrence of Court and counsel is plain in the understanding that the controlling question presented by the record was one of general law and to be so determined by application of those principles which the Courts both of this country and in England had applied (1) to the general subject of gifts *causa mortis* and (2) the effective transfer of shares of stock thereunder, by mere delivery *inter partes*. That the State Supreme Court did not regard the case as involving any question of a Federal character is evident from its brief reference thereto (Opinion R. 142, quoted *supra*) and its remarks on that head clearly go only to the point that the cited decisions of *this* Court affirmed the view taken by the State Supreme Court, viz., that delivery of shares of bank stock without record transfer passed the equitable title *as between the parties*—a manifestly correct reading of such decisions.

It is thus plain that if any shadow of Federal question exists in this case the *controlling* ground of the decision below is wholly independent thereof. Even had the assumed Federal question been argued below, yet as this Court said in *Brown* v. *Atwell Administrator*, 92 U. S. 327,—

" We have often decided that it is not enough to give
" us jurisdiction over the judgments of the State Courts for

" the record to show that a Federal question was argued
" or presented to that Court for decision. It must appear
" that its decision was necessary to the determination of
" the cause and that it actually was decided, or that the
" judgment as rendered could not have been given without
" deciding it."

In *Kennebec R.R.* v. *Portland R.R.*, 14 Wall. 23, the Court said:

" And where there is such distinct and sufficient ground
" for the support of the judgment of the State Court, we
" cannot take jurisdiction, because we could not reverse
" the case, though the Federal question was decided
" erroneously in the Court below against the plaintiff in
" error." *Rector* v. *Ashley*, 6 Wall. 142; *Klinger* v. *Missouri*, 13 Wall. 257; *Steines* v. *Franklin County*, 14 Wall. 15.

Again, in *Beatty* v. *Benton*, 135 U. S. 244, 254, it was held:

"The case was decided against the plaintiffs in error,
" on an independent ground, not involving a federal ques-
" tion, and broad enough to maintain the judgment. In
" such a case, even though the State Court also decides
" a federal question against the plaintiffs in error, this
" Court dismisses the writ of error without considering
" the federal question. *Marron* v. *Brinkley*, 129 U. S.
" 178, 181; Hale *v.* Akers, 132 U. S. 554, 565, and cases
" here cited; San Francisco *v.* Itsell, 133 U. S. 65, 66;
" Hopkins *v.* McLure, 133 U. S. 380, 386."

In *Beaupre* v. *Noyes*, 138 U. S. 397, 401, it was held:

"That view does not involve a Federal question;
" whether sound or not we do not inquire. It is broad
" enough in itself to support the final judgment without
" reference to the Federal question."

And in *Sayward* v. *Denny*, 158 U. S. 180, 186, the Court observes:

"And we may add that the decisions of State tribunals " in respect of matters of general law cannot be reviewed " on the theory that the law of the land is violated unless " their conclusions are absolutely free from error."

See also *Castillo* v. *McConnico et al.* (No. 48, of present term), 16 S. C. Rep., p. 229. 168 U.S. 674

The case thus clearly falls within the established rule. Under proper practice the writ of error should be dismissed—

1st. Because no federal question is properly or sufficiently presented by the record.

2d. Because no such question is involved in the case; and

3d. Because the State Supreme Court decided the case upon an independent and controlling ground not reviewable here.

Eustis v. *Bolles*, 150 U. S. 361.
Rutland R.R. v. *Central Vermont R.R.*, 159 U. S. 630.
Gillis v. *Stinchfield*, 159 U. S. 658, 660.
Seneca Nation of Indians v. *Christy*, 162 U. S. 283.
Bacon v. *Texas*, 163 U. S. 207, 228.

BRIEF IN SUPPORT OF MOTION TO AFFIRM.

Fully convinced that upon this record and foregoing argument the motion to dismiss should be granted, we submit that in any view the decision of the State Supreme Court in respect to the assumed federal question (if any such was in fact rendered or involved) was clearly right and in full accord with the law as settled by repeated decisions of this Court. And that full color for such motion to

dismiss appears, on which the alternative motion to affirm may be properly predicated, is too apparent to require further discussion.

In *Egan* v. *Hart*, 165 U. S. 188, 189, 191, this Court held:

"The record before us contains all the testimony "introduced and evidence offered in the trial Court, all of "which was open for consideration and passed upon by "the Supreme Court of the State of Louisiana. On error, "however, to a State Court, this Court cannot re-examine "the evidence, and when the facts are found below is "concluded by such finding. *Dower* v. *Richards*, 151 U. "S. 658; *Bartlett* v. *Lockwood*, 160 U. S. 357; *Stanley* v. "*Schwalby*, 162 U. S. 255, 278. True it is that in "*Dower* v. *Richards*, the Court (referring to the dictum in "*Republican River Bridge Co.* v. *Kansas Pacific Rail-*"*way*, 92 U. S. 315, 317) treated as open for further "consideration the question whether in chancery cases "the power existed in this Court to review the decision of "State Courts on both the law and the fact. We, however, "conclude that not only the very nature of a writ of error, "but also the rulings of this Court from the beginning, "make it clear that on error to a State Court in a chancery "case, as in a case at law, when the facts are found by "the Court below, this Court is concluded by such findings. "The adjudications are collected very fully in *Dower* v. "*Richards*, and in subsequent cases above referred to."

And at p. 191 the Court further held:

"It is clear that if these questions of fact are adequate "to determine the controversy between the parties and "broad enough to maintain the judgment independent "of any Federal question, then we are without jurisdic-"tion, although the State Court may have also decided "such a question. *Eustis* v. *Bolles*, 150 U. S. 361; *N.* "*Y. & N. E. Railroad* v. *Woodruff*, 153 U. S. 689; "*Hammond* v. *Conn. Mut. Life Ins. Co.*, 150 U. S. 633."

The findings of the trial Court and the decision of the State Supreme Court upon the evidence stand in entire harmony in establishing (1) clear intention to make the gift by the donor, and (2) actual delivery and surrender of the shares by him to the donee in execution of such proven intention. Manifestly this concurrent *intention* and *delivery* in consummation thereof must stand unless forbidden by positive general law, or in conflict with controlling federal statute. The question of general law is settled by the decision of the State Supreme Court. Assuming any federal question of possible existence herein, it was (1) subordinate to the *controlling* question of general law thus finally determined, and hence in no wise affects the judgment there rendered, and (2) was correctly decided by the Court below.

Foregoing argument, we submit, demonstrates that the general question thus primarily involved is controlling and the decision below thereon ends the cause. That the assumed federal question was correctly decided and in harmony with this Court's repeated decisions is also apparent from foregoing argument, to which we add the following brief suggestions:

In *Bank* v. *Lanier*, 11 Wall. 369, a national bank was held liable for unauthorized transfer of its stock as against the holder thereof by delivery without such recorded transfer from the original holder. Therein the Court said of such certificates of stock (p. 377):

"Although neither in form or character negotiable
" paper, they approximate to it as nearly as practicable.
" If we assume that the certificates in question are not
" different from those in general use by corporations, and
" the assumption is a safe one, it is easy to see why in-
" vestments of this character are sought after and relied
" upon. No better form could be adopted to assure the

" purchaser that he can buy with safety. He is told, " under the seal of the corporation, that the shareholder " is entitled to so much stock, which can be transferred " on the books of the corporation, in person or by at- " torney, when the certificates are surrendered, but not " otherwise. This is a notification to all persons in- " terested to know, that whoever in good faith buys the " stock, and produces to the corporation the certificates, " regularly assigned, with power to transfer, is entitled " to have the stock transferred to him. And the notifica- " tion goes further, for it assures the holder that the cor- " poration will not transfer the stock to any one not in " possession of the certificates."

In *Johnson* v. *Laflin*, 103 U. S. 800, 804, *supra*, the Court declared that such recorded transfer is *not* required " for the translation of the title," and again, " The trans- " ferability of shares in the national banks is not governed " by different rules from those which are ordinarily " applied to the transfer of shares in other corporate " bodies."

This distinct ruling eliminates all *federal* question from this transaction, and as clearly makes the case determinable by *general* law, to wit, those general rules of law which are " ordinarily " applied to the transfer of shares in corporate bodies. It goes further, for it as distinctly declares as the settled rule of *this* Court that title *as between the parties* passes by delivery without recorded transfer, and thus in respect to national bank stock certificates, the former decisions of this Court. *Union Bank of Georgetown* v. *Laird*, 2 Wheat. 390; *Black* v. *Zacharie*, 3 How. 483, are applied. The cited cases in this Court stand in entire harmony with the great and controlling weight of authority (which in modern times is affirmed without dissent) upon the general rule of law that delivery without recorded transfer

is sufficient to transfer the title of the holder as against *him*, and necessarily against those who claim in succession from him. The authorities cited in the opinion of the State Supreme Court and under heading II of this brief establish that conclusion beyond controversy.

In *Morawetz on Private Corporations*, Vol. 1, Sec. 223, the rule is deduced and stated from many cited authorities that—

"The formalities of a transfer are of no importance "except as conditions precedent to the consent of the "corporation; they merely indicate the methods by "which the shareholders have agreed to receive new "members."

In *Morse on Banks and Banking*, Sec. 710, it is said:

"Moreover, by-laws are not intended for the benefit of "creditors, but for the benefit of the bank and for its "internal management."

And again, Sec. 713, as to the transfer of stock:

"Such provision is intended merely for the protection "and benefit of the company." Citing many authorities.

It is obvious that the claim of the Administrator here, both upon his own pleadings and the proofs, is *solely* that the by-laws of the bank in requiring recorded transfer operate for *his* benefit—an impossible conclusion. And in this connection it is equally clear that a claim under a by-law of the bank can in no view be asserted as a claim under a law of the United States, because such law authorized the bank to adopt by-laws which are wholly "for its internal management," and "merely for the protection and benefit of the Company."

And the power of the Court below to grant the defendant

in error Davis affirmative relief by the decree as entered, requiring the bank to make the transfer of these shares upon its books to him, is founded on settled principles of equity distinctly affirmed by this Court in like cases of equitable assignment or transfer of stock wherein the right to such relief was distinctly ruled.

Mechanics' Bank v. *Seton*, 1 Pet. 299, 304.

Johnson v. *Laflin*, 103 U. S. 800, 804, citing many authorities.

In whatever view considered, it is apparent that the Supreme Court of Montana in rendering judgment in this cause reasoned wisely, and ruled justly. Its conclusions are free from error, and so far as reviewable here (if at all) stand in exact harmony with the law as conclusively settled by the prior adjudications of this Court.

We therefore submit that the writ of error should be dismissed for manifest want of jurisdiction in this Court to review the decision and decree rendered, or that such decree should be here affirmed.

Respectfully submitted.

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